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American Jurisprudence, Second Edition | May 2021 Update

Indians; Native Americans

Lonnie E. Griffith, Jr., J.D.

VIII. Domestic Relations of Indians, Indian Tribes, and Indian Children

A. Indian Marital Relationships and Divorce, in General

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A. Indian Marital Relationships and Divorce, in General

§ 97. Tribal authority and law

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The tribal self-government exception to federal regulation excepts purely intramural matters, such as domestic relations, from the general rule that otherwise applicable federal statutes apply to Indian tribes.¹ An Indian tribe has the power to regulate the marital relationships of its members.² Indian law, for example, may provide and regulate the authority of persons to perform Indian marriages,³ and may provide the standard for determining the existence of a common-law marriage⁴ or traditional Indian ceremonial marriage, albeit unlicensed, to the exclusion of state law.⁵

Federal regulations provide that the magistrate of the Court of Indian Offenses has the authority to perform marriages⁶ and provide for the valid constitution and licensing of marriages by the court.⁷

An Indian tribe's domestic relations code applicable to determinations of marital property in a divorce proceeding did not apply to a divorce proceeding in state court, when the tribe's code was inconsistent with state law,⁸ as provided by federal statute.⁹ When a state enacts a statute for this purpose, pursuant to federal law, it enables the State to impose its marital property rules whether the Indian spouses reside on or off the reservation.¹⁰

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Footnotes

- ¹ §§ 13, 14.
- ² *Montana v. U. S.*, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981) (recognizing rule); *Conroy v. Conroy*, 575 F.2d 175, 25 Fed. R. Serv. 2d 316 (8th Cir. 1978).
- ³ *In re Viles*, 6 Am. Tribal Law 3, 2005 WL 6169013 (N.A. 2005).

- 4 [Beller ex rel. Beller v. U.S.](#), 221 F.R.D. 679 (D.N.M. 2003) (common-law marriage under Navajo law).
5 [U.S. v. Jarvison](#), 409 F.3d 1221 (10th Cir. 2005).
6 25 C.F.R. § 11.600(a).
7 25 C.F.R. §§ 11.600(b), (c), 11.601 to 603.
8 [Zander v. Zander](#), 720 N.W.2d 360 (Minn. Ct. App. 2006).
9 28 U.S.C.A. § 1360.
10 [Hardy v. U.S.](#), 918 F. Supp. 312 (D. Nev. 1996).

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By federal statute, certain listed states have jurisdiction over civil causes between Indians or to which Indians are parties in those areas of Indian country within the listed states.¹ When a Native American undertakes to avail him- or herself of the services of a state court in a domestic relations marital dissolution matter, the state court has jurisdiction to act and to grant whatever relief is contemplated by the action initiated.²

The authority of an Indian tribe to regulate the marital relationships of its members³ necessarily includes the authority of its tribal courts to adjudicate controversies involving those relationships, including divorce proceedings, when the tribe's law so provides.⁴ Federal regulations provide for the dissolution of marriages by the Court of Indian Offenses.⁵ A tribal divorce court is not without jurisdiction to order a division of the spouses' real property in a divorce decree when the court acts within the applicable parameters of the Indian General Allotment Act.⁶

In a divorce action, if one of the parties is an enrolled tribal member residing on a reservation, the interrelation of state and tribal jurisdiction becomes a factor; if there is an available forum in the tribal courts, considerations of tribal sovereignty and the federal interest in promoting Indian self-governance and autonomy arise, and state court jurisdiction is prohibited if it would undermine the authority of the tribal courts over reservation affairs and infringe on the right of the Indians to govern themselves.⁷ In a divorce proceeding involving one Indian spouse and one non-Indian spouse, both residing on the reservation, the tribal court may exercise jurisdiction in the parties' divorce action to the exclusion of the state court, particularly when the State expressly defers to the tribal court if tribal law provides a rule of decision and the tribal court seeks jurisdiction.⁸ The opposite result obtains, however, when the greater contacts are with the State.⁹

After a tribal court properly exercises jurisdiction over a non-Indian spouse in a divorce proceeding, when all parties resided on the reservation, relief is limited to that afforded in the tribal system and the Indian Civil Rights Act.¹⁰

Observation:

As between Indian and non-Indian spouses, the non-Indian is not required to exhaust tribal remedies before challenging the tribe's jurisdiction over a marital dissolution proceeding, when the Indian spouse is not a member of the tribe asserting jurisdiction, the spouses' domicile is on fee land, and the dispute is distinctly nontribal in nature, outside the rubric of directly affecting the health and welfare of the tribe.¹¹

Reminder:

The jurisdictional provisions of the Indian Child Welfare Act do not apply to child custody matters in a divorce proceeding.¹²

CUMULATIVE SUPPLEMENT

Cases:

State trial court could not defer to tribal court's jurisdiction over custody dispute involving Indian child based on tribal court's first-filed child custody order without first determining whether tribal court exercised its jurisdiction substantially in compliance with Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), including determining whether state, tribe, or another jurisdiction was child's home state and whether tribal court, if it was not child's home state, had UCCJEA-compliant basis for exercising jurisdiction in entering first-filed order. [Ariz. Rev. Stat. Ann. §§ 25-1002\(7\)\(a\), 25-1031\(A\)](#). [Holly C. v. Tohono O'odham Nation](#), 452 P.3d 725 (Ariz. Ct. App. Div. 2 2019).

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Footnotes

- 1 [28 U.S.C.A. § 1360](#).
A state may enact a statute assuming state civil jurisdiction for this purpose whether the Indian spouses reside on or off the reservation. [Hardy v. U.S.](#), 918 F. Supp. 312 (D. Nev. 1996).
As to state court civil jurisdiction in Indian matters, generally, see [§§ 130 et seq.](#)
As to jurisdiction under the Indian Child Welfare Act, generally, see [§§ 104 et seq.](#)
- 2 [In re Marriage of Jacobsen](#), 121 Cal. App. 4th 1187, 18 Cal. Rptr. 3d 162 (2d Dist. 2004).

3 §§ 97, 98.
4 Conroy v. Conroy, 575 F.2d 175, 25 Fed. R. Serv. 2d 316 (8th Cir. 1978).
5 25 C.F.R. §§ 11.605 to 11.608.
6 Conroy v. Conroy, 575 F.2d 175, 25 Fed. R. Serv. 2d 316 (8th Cir. 1978).
7 Kelly v. Kelly, 2009 ND 20, 759 N.W.2d 721 (N.D. 2009).
Concurrent but not exclusive state court jurisdiction in a divorce action involving Indian and non-Indian
spouses did not impermissibly infringe on the tribe's self-governance. *Garcia v. Gutierrez*, 2009-NMSC-044,
147 N.M. 105, 217 P.3d 591 (2009).
8 Sanders v. Robinson, 864 F.2d 630 (9th Cir. 1988).
9 Kelly v. Kelly, 2009 ND 20, 759 N.W.2d 721 (N.D. 2009).
10 Sanders v. Robinson, 864 F.2d 630 (9th Cir. 1988).
11 Martinez v. Martinez, 2008 WL 5262793 (W.D. Wash. 2008).
12 § 101.

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1. Purpose, Applicability, and Construction of Indian Child Welfare Act

§ 99. Purpose and validity of Indian Child Welfare Act

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The Indian Child Welfare Act (ICWA)¹ is intended to protect the interests of Indian children and to promote the stability and security of Indian tribes and families² by establishing minimum standards for removal of Indian children from their families³ and placement of Indian children in foster or adoptive homes which will reflect the unique values of Indian culture.⁴ The ICWA was enacted to address the consequences of abusive child welfare practices that separated Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.⁵ The federal policy underlying the ICWA is that, where possible, an Indian child should remain in the Indian community and that Indian child welfare determinations should not be based on a white, middle-class standard which, in many cases, forecloses adoption placement with an Indian family.⁶

Differential treatment of Indians and non-Indians under the ICWA does not violate substantive due process or equal protection, being rationally related both to the protection of the integrity of American Indian families and tribes and to the fulfillment of Congress's unique guardianship obligation toward Indians.⁷ The ICWA does not implicate any fundamental rights or suspect classifications, requiring only a rational basis.⁸

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- ¹ 25 U.S.C.A. §§ 1901 et seq.
For regulations governing the Act, see 25 C.F.R. §§ 23.1 et seq.

- 2 Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 109 S. Ct. 1597, 104 L. Ed. 2d 29 (1989);
G.L. v. Department of Children and Families, 80 So. 3d 1065 (Fla. 5th DCA 2012); New Jersey Div. of
3 Child Protection and Permanency v. K.T.D., 439 N.J. Super. 363, 108 A.3d 685 (App. Div. 2015).
In re C.Y., 208 Cal. App. 4th 34, 144 Cal. Rptr. 3d 516 (3d Dist. 2012); People ex rel. A.R., 2012 COA
4 195M, 310 P.3d 1007 (Colo. App. 2012), as modified on denial of reh'g, (Dec. 27, 2012).
In re Jeremiah G., 172 Cal. App. 4th 1514, 92 Cal. Rptr. 3d 203 (3d Dist. 2009).
5 Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 186 L. Ed. 2d 729 (2013).
6 Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 109 S. Ct. 1597, 104 L. Ed. 2d 29 (1989).
7 In re Adoption of Hannah S., 142 Cal. App. 4th 988, 48 Cal. Rptr. 3d 605 (3d Dist. 2006); In re Baby Boy
C., 27 A.D.3d 34, 805 N.Y.S.2d 313 (1st Dep't 2005).
8 In re Baby Boy C., 27 A.D.3d 34, 805 N.Y.S.2d 313 (1st Dep't 2005).

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1. Purpose, Applicability, and Construction of Indian Child Welfare Act

§ 100. Role of tribe under Indian Child Welfare Act

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The Indian Child Welfare Act (ICWA) seeks to provide Native American tribes with the ability to preserve their culture and identity,¹ protecting the rights of the Indian community and tribe in retaining their children in their society² and granting tribal courts either exclusive or concurrent jurisdiction over child custody and adoption matters³ involving an "Indian child" and tribe.⁴ The ICWA gives rights not only to parents of Indian children but also to the tribes.⁵ The protection of the tribal interest is at the core of the ICWA,⁶ which recognizes that the tribe has a unique interest in the child,⁷ distinct from but on parity with the interest of the child's parents⁸ as recognized in the ICWA's full faith and credit clause in reference to tribal judgments.⁹

The ICWA presumes that it is in the best interests of a child to retain tribal ties and cultural heritage and in the interest of the tribe to preserve its future generations¹⁰ and that protection of the Indian child's relationship to the tribe is in the child's best interests.¹¹

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Footnotes

- ¹ [In re H.D.](#), 343 Ill. App. 3d 483, 278 Ill. Dec. 194, 797 N.E.2d 1112 (4th Dist. 2003).
- ² [Navajo Nation v. Arizona Dept. of Economic Sec.](#), 230 Ariz. 339, 284 P.3d 29 (Ct. App. Div. 1 2012), as amended, (Sept. 5, 2012); [In re Interest of Zylena R.](#), 284 Neb. 834, 825 N.W.2d 173 (2012), cert. denied, 134 S. Ct. 65, 187 L. Ed. 2d 28 (2013).
- ³ §§ 104 to 107.
- ⁴ § 102.

- 5 New Jersey Div. of Child Protection and Permanency v. K.T.D., 439 N.J. Super. 363, 108 A.3d 685 (App. Div. 2015).
- 6 In re K.S., 448 S.W.3d 521 (Tex. App. Tyler 2014), review denied, (Dec. 5, 2014).
- 7 In re M.S., 2014 MT 265, 376 Mont. 394, 336 P.3d 930 (2014), as amended, (Nov. 12, 2014).
- 8 In re K.S., 448 S.W.3d 521 (Tex. App. Tyler 2014), review denied, (Dec. 5, 2014).
The tribal interest is not superior to the parents' interest. In re Anthony T., 208 Cal. App. 4th 1019, 146 Cal. Rptr. 3d 124 (4th Dist. 2012).
- 9 Simmonds v. Parks, 329 P.3d 995 (Alaska 2014).
- 10 Guardianship of D.W., 221 Cal. App. 4th 242, 164 Cal. Rptr. 3d 414 (1st Dist. 2013).
- 11 Navajo Nation v. Arizona Dept. of Economic Sec., 230 Ariz. 339, 284 P.3d 29 (Ct. App. Div. 1 2012), as amended, (Sept. 5, 2012); In re Interest of Zylena R., 284 Neb. 834, 825 N.W.2d 173 (2012), cert. denied, 134 S. Ct. 65, 187 L. Ed. 2d 28 (2013).

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1. Purpose, Applicability, and Construction of Indian Child Welfare Act

§ 101. Applicability of Indian Child Welfare Act

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[Construction and Application by State Courts of Indian Child Welfare Act of 1978 Requirement of Active Efforts to Provide Remedial Services, 25 U.S.C.A. s 1912\(d\), 61 A.L.R.6th 521](#)

[Construction and Application of Indian Child Welfare Act of 1978 \(ICWA\) \(25 U.S.C.A. ss1901 et seq.\) Upon Child Custody Determinations, 89 A.L.R.5th 195 \(secs. 17\(a\), 17\(b\), 17\(c\) superseded in part by \[Construction and Application by State Courts of Indian Child Welfare Act of 1978 Requirement of Active Efforts to Provide Remedial Services, 25 U.S.C.A. s 1912\\(d\\), 61 A.L.R.6th 521\]\(#\), and secs. 7\(a\), 7\(b\) superseded in part by \[Validity, Construction, and Application of Placement Preferences of State and Federal Indian Child Welfare Acts, 63 A.L.R.6th 429\]\(#\)\)](#)

Compliance with the Federal Indian Child Welfare Act (ICWA)¹ is required in child custody proceedings,² whether voluntary,³ or involuntary,⁴ when an "Indian child" is involved.⁵ Both elements must be established, as defined in the ICWA,⁶ and the burden falls on the party who seeks to invoke the ICWA.⁷

The ICWA, by its terms,⁸ does not apply to custody disputes between parents in a divorce context⁹ as the term "child custody proceeding" includes foster care placement, termination of parental rights, preadoptive placement, and adoptive placement.¹⁰

The ICWA does not apply retroactively¹¹ and does not create a private right of action against participants in the underlying court proceeding.¹²

When the ICWA provides a higher standard of protection to the Indian family than is otherwise provided by state law, the ICWA's standard prevails.¹³

CUMULATIVE SUPPLEMENT

Statutes:

25 C.F.R. Pt. 23 Subpt. I (25 C.F.R. §§ 23.133 to 23.144), as added effective December 12, 2016, clarifies the minimum federal standards governing implementation of the Indian Child Welfare Act (ICWA) to ensure that ICWA is applied in all states consistently, including pretrial requirements (25 C.F.R. §§ 23.107 to 23.114), petitions to transfer to tribal court (25 C.F.R. §§ 23.115 to 23.119), involuntary and voluntary proceedings (25 C.F.R. §§ 23.120 to 23.128), dispositions (25 C.F.R. §§ 23.129 to 23.132) and recordkeeping (25 C.F.R. §§ 23.140 to 23.142).

Cases:

Dispute between maternal relative and paternal relative as to who should have custody of three Indian children after father allegedly killed their mother was child custody proceeding involving Indian children, and thus, Indian Child Welfare Act (ICWA) applied to the proceeding, where maternal relative sought to remove the children from father, place them in her home, and prevent father from having the children returned upon his demand. Indian Child Welfare Act of 1978 § 4, 25 U.S.C.A. § 1903(1) (i). *Rice v. McDonald*, 390 P.3d 1133 (Alaska 2017).

County department of children and family services failed to adequately investigate mother's claim of Indian ancestry, before determining that Indian Child Welfare Act (ICWA) did not apply to case in which father's parental rights to dependent children were terminated, where, although name of tribe identified by mother as potential heritage did not match a federally recognized tribe or even any tribe, name as stated by mother was similar to name of a federally recognized tribe, and department did not interview relative who mother stated might have additional information about family's Indian ancestry. Indian Child Welfare Act of 1978 § 3, 25 U.S.C.A. § 1902; Cal. Welf. & Inst. Code § 224.3(a). *In re Elizabeth M.*, 19 Cal. App. 5th 768, 228 Cal. Rptr. 3d 213 (2d Dist. 2018).

The trial court knew or had reason to know that Indian children were involved in trial to terminate mother's parental rights, as would require application of Indian Child Welfare Act (ICWA) to proceedings, therefore, the trial court's denial of mother's motion for new trial was error as a matter of law and remand was required; mother attached certificates of children's enrollment in tribe to motion for new trial, and even though there was evidence that Indian tribe notified the Department of Human Services that children were ineligible for enrollment in tribe at the time of the initial trial, mother's testimony detailed her efforts to trace her lineage in order to enroll children and specified that such enrollment was still being processed at the time of trial. Indian Child Welfare Act of 1978 § 2, 25 U.S.C.A. § 1901. *Matter of J.W.E.*, 2018 OK CIV APP 29, 419 P.3d 374 (Div. 2 2018).

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Footnotes

1 25 U.S.C.A. §§ 1901 et seq.

For regulations governing the Act, see 25 C.F.R. §§ 23.1 et seq.

People ex rel. A.R., 2012 COA 195M, 310 P.3d 1007 (Colo. App. 2012), as modified on denial of reh'g, (Dec. 27, 2012); In re Interest of Jayden D., 21 Neb. App. 666, 842 N.W.2d 199 (2014); In re E.G.M., 750 S.E.2d 857 (N.C. Ct. App. 2013).

§ 108.

§§ 109 to 112.

§ 102.

Empson-Laviolette v. Crago, 280 Mich. App. 620, 760 N.W.2d 793 (2008); In re M.R.P.-C., 794 N.W.2d 373 (Minn. Ct. App. 2011); In re T.S., 2013 OK CIV APP 108, 315 P.3d 1030 (Div. 3 2013), as corrected, (Jan. 8, 2014).

In re Nery V., 20 Neb. App. 798, 832 N.W.2d 909 (2013); Merrill v. Altman, 2011 SD 94, 807 N.W.2d 821 (S.D. 2011).

25 U.S.C.A. § 1903(1).

Comanche Indian Tribe of Oklahoma v. Hovis, 53 F.3d 298 (10th Cir. 1995); Asa'carsarmiut Tribal Council v. Wheeler, 337 P.3d 1182 (Alaska 2014).

People ex rel. A.R., 2012 COA 195M, 310 P.3d 1007 (Colo. App. 2012), as modified on denial of reh'g, (Dec. 27, 2012); In re Interest of Jayden D., 21 Neb. App. 666, 842 N.W.2d 199 (2014).

As to placement preferences under the ICWA, and deviations, see §§ 117 to 119.

E. A. v. State, 623 P.2d 1210 (Alaska 1981); Matter of Adoption of Baby Nancy, 27 Wash. App. 278, 616 P.2d 1263 (Div. 1 1980).

Parkell v. South Carolina, 687 F. Supp. 2d 576 (D.S.C. 2009).

In re E.G.M., 750 S.E.2d 857 (N.C. Ct. App. 2013).

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1. Purpose, Applicability, and Construction of Indian Child Welfare Act

§ 102. Indian child and tribe under Indian Child Welfare Act

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The Indian Child Welfare Act (ICWA) requires an initial determination that the child in question is an "Indian child,"¹ and the party asserting the applicability of the ICWA has the burden of establishing that the child qualifies.² The burden requires more than raising the mere possibility that the child has Native American ancestry.³ A mere assertion of Indian heritage or blood is insufficient.⁴

Definitions:

Under the ICWA, "Indian child" means any unmarried person who is under age 18 and is either: (a) a member of an Indian tribe; or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.⁵ The ICWA also defines the terms "Indian tribe"⁶ and "Indian child's tribe."⁷ The ICWA does not, however, define tribal membership.⁸

The tribe itself must be one federally recognized as a tribe,⁹ and the question whether a person is a member of the tribe is for the tribe to answer,¹⁰ making the tribe's determination of membership or membership eligibility conclusive and final.¹¹ The court will not go behind a tribe's internal decision-making processes in regard to membership determinations.¹²

The child's enrollment in a tribe is the common evidentiary means of establishing the child's Indian status, but it is not the only means nor is it necessarily determinative,¹³ and the ICWA applies regardless of whether the child is enrolled with the tribe.¹⁴ Likewise, the enrollment of a child's parents in an Indian tribe is not the sole means to establish a child's tribal membership for the purposes of the ICWA.¹⁵ A child can be an Indian child even if neither biological parents are members of the tribe or have tribal ancestry provided the other statutory criteria are met.¹⁶ The ICWA applies to Indian children of mixed parentage from intertribal marriages provided membership status is shown.¹⁷

The ICWA does not automatically exclude children adopted by persons with Indian heritage, but the adoptive child of a mother who is a tribe member is not an Indian child under the ICWA when the child is not a member of a tribe and is not a biological child of a member of a tribe.¹⁸

Observation:

An exception to the applicability of the ICWA, termed the "Existing Indian Family Exception," renders the ICWA inapplicable unless the Indian child is actually part of an existing Indian family unit, as recognized by some courts,¹⁹ but most courts have declined to adopt the exception, finding no basis for it in the plain text of the ICWA.²⁰

CUMULATIVE SUPPLEMENT

Cases:

Provision of ICWA granting Indian tribes authority to reorder congressionally enacted adoption placement preferences by tribal decree and to apply their preferred order to the states, and federal regulation providing that tribe's established placement preferences applied over those specified in ICWA violated the non-delegation doctrine, where ICWA gave tribes power to change specifically enacted Congressional priorities and impose them on third parties, and Constitution did not permit Indian tribes to exercise federal legislative or executive regulatory power over non-tribal persons on non-tribal land, despite tribes' quasi-sovereign status. U.S. Const. art. 1, § 1, cl. 1; [U.S. Const. art. 1, § 8, cl. 3](#); Indian Child Welfare Act of 1978 § 105, [25 U.S.C.A. § 1915\(c\)](#); [25 C.F.R. § 23.130\(b\)](#). [Brackeen v. Zinke](#), 338 F. Supp. 3d 514 (N.D. Tex. 2018).

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Footnotes

- 1 In re M.R.P.-C., 794 N.W.2d 373 (Minn. Ct. App. 2011); In re C.C., 187 Ohio App. 3d 365, 2010-Ohio-780, 932 N.E.2d 360 (8th Dist. Cuyahoga County 2010); In re Beach, 159 Wash. App. 686, 246 P.3d 845 (Div. 3 2011).
- 2 People ex rel. E.C., 259 P.3d 1272 (Colo. App. 2010); In re F.O., 2014 IL App (1st) 140954, 387 Ill. Dec. 411, 22 N.E.3d 456 (App. Ct. 1st Dist. 2014); Merrill v. Altman, 2011 SD 94, 807 N.W.2d 821 (S.D. 2011).
- 3 In re C.C., 187 Ohio App. 3d 365, 2010-Ohio-780, 932 N.E.2d 360 (8th Dist. Cuyahoga County 2010).
- 4 In re Adoption of C.D., 2008 ND 128, 751 N.W.2d 236 (N.D. 2008).
- 5 25 U.S.C.A. § 1903(4).
- 6 25 U.S.C.A. § 1903(8).
- 7 25 U.S.C.A. § 1903(5).
- 8 In re Jack C., III, 192 Cal. App. 4th 967, 122 Cal. Rptr. 3d 6 (4th Dist. 2011); People ex rel. T.M.W., 208 P.3d 272 (Colo. App. 2009).
- 9 In re Adoption of A.M.C., 368 Ark. 369, 246 S.W.3d 426 (2007); In re A.D.L., 169 N.C. App. 701, 612 S.E.2d 639 (2005).
- Native Hawaiians are not recognized as Indian tribes for purposes of the ICWA. *Alyssa B. v. State, Dept. of Health and Social Services, Div. of Family & Youth Services*, 165 P.3d 605 (Alaska 2007).
- 10 In re J.M., 206 Cal. App. 4th 375, 141 Cal. Rptr. 3d 738 (2d Dist. 2012); In re M.H., 50 Kan. App. 2d 1162, 337 P.3d 711 (2014); In re Morris, 491 Mich. 81, 815 N.W.2d 62 (2012).
- The tribe determines who meets the criteria for membership. *People ex rel. N.D.C.*, 210 P.3d 494 (Colo. App. 2009).
- 11 *Jared P. v. Glade T.*, 221 Ariz. 21, 209 P.3d 157 (Ct. App. Div. 1 2009); In re J.M., 206 Cal. App. 4th 375, 141 Cal. Rptr. 3d 738 (2d Dist. 2012).
- The tribes' inherent membership power is entitled to great deference under the ICWA. In re Adoption of C.D.K., 629 F. Supp. 2d 1258 (D. Utah 2009).
- 12 In re Adoption of C.D., 2008 ND 128, 751 N.W.2d 236 (N.D. 2008).
- 13 *Jared P. v. Glade T.*, 221 Ariz. 21, 209 P.3d 157 (Ct. App. Div. 1 2009); In re Jack C., III, 192 Cal. App. 4th 967, 122 Cal. Rptr. 3d 6 (4th Dist. 2011).
- 14 *D.B. v. Superior Court*, 171 Cal. App. 4th 197, 89 Cal. Rptr. 3d 566 (1st Dist. 2009), as modified, (Feb. 26, 2009).
- 15 *D.B. v. Superior Court*, 171 Cal. App. 4th 197, 89 Cal. Rptr. 3d 566 (1st Dist. 2009), as modified, (Feb. 26, 2009); In re F.O., 2014 IL App (1st) 140954, 387 Ill. Dec. 411, 22 N.E.3d 456 (App. Ct. 1st Dist. 2014).
- 16 In re B.R., 176 Cal. App. 4th 773, 97 Cal. Rptr. 3d 890 (1st Dist. 2009).
- 17 *Simmonds v. Parks*, 329 P.3d 995 (Alaska 2014).
- 18 In re Francisco D., 230 Cal. App. 4th 73, 178 Cal. Rptr. 3d 388 (2d Dist. 2014).
- An adopted child who is not a member of the tribe at the time of the adoption is not an Indian child for purposes of the ICWA although the child is eligible for tribal membership. *Nielson v. Ketchum*, 640 F.3d 1117 (10th Cir. 2011).
- 19 Ex parte C.L.J., 946 So. 2d 880 (Ala. Civ. App. 2006); *Rye v. Weasel*, 934 S.W.2d 257 (Ky. 1996); In re N.J., 125 Nev. 835, 221 P.3d 1255 (2009).
- 20 In re Autumn K., 221 Cal. App. 4th 674, 164 Cal. Rptr. 3d 720 (1st Dist. 2013); In re A.J.S., 288 Kan. 429, 204 P.3d 543 (2009); In re Baby Boy C., 27 A.D.3d 34, 805 N.Y.S.2d 313 (1st Dep't 2005); In the Matter of Baby Boy L., 2004 OK 93, 103 P.3d 1099 (Okla. 2004); *Thompson v. Fairfax County Dept. of Family Services*, 62 Va. App. 350, 747 S.E.2d 838 (2013).

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B. Indian Child Welfare and Custody; Indian Child Welfare Act

1. Purpose, Applicability, and Construction of Indian Child Welfare Act

§ 103. Rules of construction for Indian Child Welfare Act

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[Construction and Application by State Courts of Indian Child Welfare Act of 1978 Requirement of Active Efforts to Provide Remedial Services, 25 U.S.C.A. s 1912\(d\), 61 A.L.R.6th 521](#)

[Construction and Application of Indian Child Welfare Act of 1978 \(ICWA\) \(25 U.S.C.A. ss1901 et seq.\) Upon Child Custody Determinations, 89 A.L.R.5th 195 \(secs. 17\(a\), 17\(b\), 17\(c\) superseded in part by \[Construction and Application by State Courts of Indian Child Welfare Act of 1978 Requirement of Active Efforts to Provide Remedial Services, 25 U.S.C.A. s 1912\\(d\\), 61 A.L.R.6th 521\]\(#\), and secs. 7\(a\), 7\(b\) superseded in part by \[Validity, Construction, and Application of Placement Preferences of State and Federal Indian Child Welfare Acts, 63 A.L.R.6th 429\]\(#\)\)](#)

The Indian Child Welfare Act (ICWA) is a remedial statute and its terms should be liberally construed to achieve their purpose.¹ When interpreting the ICWA, a state court may apply guidelines provided by the Bureau of Indian Affairs, and while the guidelines are not actually binding on state courts, they are entitled to great weight as the administrative interpretation of the ICWA.²

CUMULATIVE SUPPLEMENT

Cases:

Courts are required to liberally construe, in favor of notice, the reason to know standard in ICWA and Washington State Indian Child Welfare Act (WICWA), providing that if a court has a reason to know that the child at issue in child custody proceeding is an Indian child, court must apply the protections of ICWA and WICWA, and any doubt about the reason to know standard should be resolved in favor of tribes. Indian Child Welfare Act of 1978 §§ 4, 102, [25 U.S.C.A. §§ 1903\(4\), 1912\(a\)](#); [Wash. Rev. Code Ann. §§ 13.38.040, 13.38.070\(1\)](#); [25 C.F.R. § 23.107\(b\)\(2\)](#). [Matter of Dependency of Z.J.G., 471 P.3d 853 \(Wash. 2020\)](#).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Steven H. v. Arizona Dept. of Economic Security, 218 Ariz. 566, 190 P.3d 180 \(2008\)](#); [Empson-Laviolette v. Crago, 280 Mich. App. 620, 760 N.W.2d 793 \(2008\)](#); [In re T.S., 2013 OK CIV APP 108, 315 P.3d 1030 \(Div. 3 2013\)](#), as corrected, (Jan. 8, 2014).
- 2 [R.R. v. Superior Court, 180 Cal. App. 4th 185, 103 Cal. Rptr. 3d 110 \(3d Dist. 2009\)](#).

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41 Am. Jur. 2d Indians; Native Americans § 104

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B. Indian Child Welfare and Custody; Indian Child Welfare Act

2. Jurisdiction Under Indian Child Welfare Act

§ 104. Exclusive jurisdiction of tribal court under Indian Child Welfare Act

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Indians](#)  134(3)

The Indian Child Welfare Act (ICWA)¹ provides that an Indian tribal court has jurisdiction exclusive as to any state over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of the tribe except when jurisdiction is otherwise vested in the state by existing federal law; when an Indian child is a ward of a tribal court, the Indian tribe will retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.² The child's reservation domicile is conclusive of the tribal court's jurisdiction under this provision,³ but the ICWA does not divest state courts of jurisdiction over Indian children living off the reservation.⁴ Federal law, not state law, determines the domicile of an Indian child, for purposes of determining jurisdiction under the ICWA.⁵

A tribal court commands exclusive subject matter jurisdiction in domestic relations disputes between two enrolled tribal members domiciled on the reservation,⁶ including a paternity dispute,⁷ a child support dispute,⁸ and a proceeding over foster care or the termination of parental rights.⁹

CUMULATIVE SUPPLEMENT

Cases:

During the pendency of mother's and father's appeal from termination of their parental rights in dependency proceeding, the juvenile court lacked jurisdiction to issue a postjudgment order finding that the county child welfare agency complied with the

Indian Child Welfare Act (ICWA), since the order related to a collateral dispute of the termination order. [25 U.S.C.A. § 1901 et seq.](#); [Cal. Welf. & Inst. Code § 366.26\(i\)\(1\)](#). [In re K.M., 195 Cal. Rptr. 3d 126 \(Cal. App. 4th Dist. 2015\)](#).

Tribal court order dismissing grandmother's request for custody of the child and/or protection order to prevent mother from contacting the child, which referenced an earlier order dismissing the custody issue because the tribal court lacked jurisdiction, did not establish that tribal court acquired jurisdiction over the child under the Indian Child Welfare Act (ICWA) or acquired jurisdiction to make permanent custody decisions. Indian Child Welfare Act of 1978 § 101, [25 U.S.C.A. § 1911\(d\)](#). [Mitchell v. Preston, 2019 WY 41, 439 P.3d 718 \(Wyo. 2019\)](#).

[END OF SUPPLEMENT]

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Footnotes

- 1 [25 U.S.C.A. §§ 1901 et seq.](#)
For regulations governing the Act, see [25 C.F.R. §§ 23.1 et seq.](#)
- 2 [25 U.S.C.A. § 1911\(a\)](#).
As to the limited territorial jurisdiction of the ICWA in adoption proceedings, see [Am. Jur. 2d, Adoption § 112](#).
- 3 [Navajo Nation v. Confederated Tribes and Bands of the Yakama Indian Nation, 331 F.3d 1041 \(9th Cir. 2003\)](#); [In re M.F., 290 Kan. 142, 225 P.3d 1177 \(2010\)](#).
- 4 [§ 105](#).
- 5 [Searle v. Searle, 2001 UT App 367, 38 P.3d 307 \(Utah Ct. App. 2001\)](#).
- 6 [State ex rel. LeCompte v. Keckler, 2001 SD 68, 628 N.W.2d 749 \(S.D. 2001\)](#).
- 7 [Roe v. Doe, 2002 ND 136, 649 N.W.2d 566 \(N.D. 2002\)](#); [State ex rel. Jealous of Him v. Mills, 2001 SD 65, 627 N.W.2d 790 \(S.D. 2001\)](#).
- 8 [State ex rel. Jealous of Him v. Mills, 2001 SD 65, 627 N.W.2d 790 \(S.D. 2001\)](#).
- 9 [In re M.F., 290 Kan. 142, 225 P.3d 1177 \(2010\)](#).

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41 Am. Jur. 2d Indians; Native Americans § 105

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B. Indian Child Welfare and Custody; Indian Child Welfare Act

2. Jurisdiction Under Indian Child Welfare Act

§ 105. Concurrent jurisdiction of tribal court and state court

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West's Key Number Digest

West's Key Number Digest, [Indians](#)  134(3)

The Indian Child Welfare Act (ICWA)¹ creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation.² Thus, the ICWA creates limitations on state jurisdiction over defined proceedings, not limitations on tribal jurisdiction over those proceedings.³

A tribal-state agreement⁴ may confer jurisdiction on the state court in cases of concurrent jurisdiction on a case-by-case basis.⁵

Practice Tip:

Issues regarding concurrent tribal and state jurisdiction are generally addressed in the context of transfer proceedings under the ICWA.⁶

Footnotes

- 1 25 U.S.C.A. § 1911(b).
For regulations governing the Act, see 25 C.F.R. §§ 23.1 et seq.
- 2 Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 109 S. Ct. 1597, 104 L. Ed. 2d 29 (1989); Navajo Nation v. Confederated Tribes and Bands of the Yakama Indian Nation, 331 F.3d 1041 (9th Cir. 2003); In re M.H., 2011 IL App (1st) 110196, 353 Ill. Dec. 648, 956 N.E.2d 510 (App. Ct. 1st Dist. 2011); State, in interest of E.B., 2014 UT App 115, 327 P.3d 594 (Utah Ct. App. 2014), cert. denied, 333 P.3d 365 (Utah 2014).
- 3 State v. Native Village of Tanana, 249 P.3d 734 (Alaska 2011).
- 4 25 U.S.C.A. § 1919(a).
- 5 In re Parental Rights as to S.M.M.D., 272 P.3d 126, 128 Nev. Adv. Op. No. 2 (Nev. 2012).
- 6 § 106.

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41 Am. Jur. 2d Indians; Native Americans § 106

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B. Indian Child Welfare and Custody; Indian Child Welfare Act

2. Jurisdiction Under Indian Child Welfare Act

§ 106. Transfer of proceedings to tribal court

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West's Key Number Digest

West's Key Number Digest, [Indians](#)  134(3)

The Indian Child Welfare Act (ICWA) provides that, on petition of either parent or the Indian custodian or the Indian child's tribe, state court proceedings for foster care placement or termination of parental rights involving an Indian child not domiciled or residing within the reservation of the Indian child's tribe must be transferred to the tribal court except in cases of good cause, objection by either parent, or declination of jurisdiction by the tribal court.¹

Absent a petition for transfer, the state court retains jurisdiction,² but once there is a petition for a transfer to the tribal court, the state court cannot proceed without first determining whether jurisdiction of the matter should be transferred to the tribe,³ including whether the tribal court is declining jurisdiction.⁴ The tribal court, not the tribe, must decline the transfer in order for that basis to enable a state court to proceed.⁵

The good cause provision provides flexibility to state courts in addressing ICWA transfers to a tribal court, and the determination is not purely a legal question but involves subjective and personal facts,⁶ measured by the standard of an abuse of discretion by the state court⁷ and clear and convincing evidence.⁸

Factors for consideration include the tribe's colorable and plausible claim to jurisdiction in the matter,⁹ the prospect of immediate serious emotional or physical damage to the child flowing from the transfer itself,¹⁰ forum non conveniens, or undue hardship on the parties or witnesses,¹¹ the stage of the state proceeding as already advanced,¹² remaining open issues regarding the proper placement of the child,¹³ and the tribe's willingness to permit the child to remain in the current situation pending the adjudication.¹⁴

Observation:

Some courts have applied a test for the child's best interests in examining the question of good cause for a transfer to the tribal court¹⁵ while other courts state that the best interest of the child is not an applicable standard for determining good cause to deny a transfer motion.¹⁶

The burden of establishing good cause to deny transfer to the tribal court is on the party opposing the transfer,¹⁷ and the state court is not bound by Bureau of Indian Affairs' guidelines regarding the good cause exception.¹⁸

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Footnotes

- 1 25 U.S.C.A. § 1911(b).
Regulations govern procedures for the transfer of placement and care responsibility of child from a state to a tribe under agency programs. 45 C.F.R. §§ 1356.67, 1356.68.
- 2 In re Breana M., 18 Neb. App. 910, 795 N.W.2d 660 (2011).
- 3 In re Interest of Lawrence H., 16 Neb. App. 246, 743 N.W.2d 91 (2007).
- 4 In re Shawnda G., 2001 WI App 194, 247 Wis. 2d 158, 634 N.W.2d 140 (Ct. App. 2001).
An affirmative declination by the tribal court is required. In re J.W.C., 2011 MT 312, 363 Mont. 85, 265 P.3d 1265 (2011).
- 5 In re J.W.C., 2011 MT 312, 363 Mont. 85, 265 P.3d 1265 (2011).
- 6 In re S.B.C., 2014 MT 345, 377 Mont. 400, 340 P.3d 534 (2014).
- 7 In re S.B.C., 2014 MT 345, 377 Mont. 400, 340 P.3d 534 (2014); In re Interest of Lawrence H., 16 Neb. App. 246, 743 N.W.2d 91 (2007); Thompson v. Fairfax County Dept. of Family Services, 62 Va. App. 350, 747 S.E.2d 838 (2013).
- 8 In re S.B.C., 2014 MT 345, 377 Mont. 400, 340 P.3d 534 (2014); In re M.S., 2010 OK 46, 237 P.3d 161 (Okla. 2010).
- 9 Simmonds v. Parks, 329 P.3d 995 (Alaska 2014).
- 10 Thompson v. Fairfax County Dept. of Family Services, 62 Va. App. 350, 747 S.E.2d 838 (2013).
- 11 In re M.H., 2011 IL App (1st) 110196, 353 Ill. Dec. 648, 956 N.E.2d 510 (App. Ct. 1st Dist. 2011); In re Interest of Jayden D., 21 Neb. App. 666, 842 N.W.2d 199 (2014).
- 12 In re S.B.C., 2014 MT 345, 377 Mont. 400, 340 P.3d 534 (2014); In re Interest of Jayden D., 21 Neb. App. 666, 842 N.W.2d 199 (2014).
- 13 In re S.B.C., 2014 MT 345, 377 Mont. 400, 340 P.3d 534 (2014).
- 14 Thompson v. Fairfax County Dept. of Family Services, 62 Va. App. 350, 747 S.E.2d 838 (2013).
- 15 In re S.B.C., 2014 MT 345, 377 Mont. 400, 340 P.3d 534 (2014); Thompson v. Fairfax County Dept. of Family Services, 62 Va. App. 350, 747 S.E.2d 838 (2013).
- 16 In re Interest of Jayden D., 21 Neb. App. 666, 842 N.W.2d 199 (2014).
- 17 In re Melaya F., 19 Neb. App. 235, 810 N.W.2d 429 (2011).
- 18 In re C.R.H., 29 P.3d 849 (Alaska 2001).

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B. Indian Child Welfare and Custody; Indian Child Welfare Act

2. Jurisdiction Under Indian Child Welfare Act

§ 107. Full faith and credit

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West's Key Number Digest

West's Key Number Digest, [Indians](#)  133

The Indian Child Welfare Act (ICWA) entails a statutory guarantee that a tribe's vital sovereign interests in the welfare of its children will be respected by state courts,¹ specifically providing that the United States, every state, every territory or possession of the United States, and every Indian tribe must give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.² The mandate requires state courts to give the same respect to tribal court judgments as given to the judgments of courts of sister states³ provided the tribal court complies with the requirements of a state's foreign judgment act⁴ and the state's own legitimate public policy.⁵

The ICWA full faith and credit mandate has provided the basis for a tribe's declaratory judgment action against the State predicated on the state's refusal to give full faith and credit to tribal custody and adoption decrees.⁶

Federally recognized Alaska Native tribes are entitled to full faith and credit with respect to ICWA-defined child custody orders to the same extent as other states' and foreign orders.⁷

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Footnotes

- ¹ [Simmonds v. Parks](#), 329 P.3d 995 (Alaska 2014).
- ² [25 U.S.C.A. § 1911\(d\)](#).
- ³ [Simmonds v. Parks](#), 329 P.3d 995 (Alaska 2014).

- 4 Searle v. Searle, 2001 UT App 367, 38 P.3d 307 (Utah Ct. App. 2001).
5 In re Laura F., 83 Cal. App. 4th 583, 99 Cal. Rptr. 2d 859 (5th Dist. 2000).
6 State v. Native Village of Tanana, 249 P.3d 734 (Alaska 2011).
7 State v. Native Village of Tanana, 249 P.3d 734 (Alaska 2011).

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VIII. Domestic Relations of Indians, Indian Tribes, and Indian Children

B. Indian Child Welfare and Custody; Indian Child Welfare Act

3. Foster Placement or Termination of Parental Rights Under Indian Child Welfare Act

a. Voluntary Proceedings Under Indian Child Welfare Act

§ 108. Voluntary consent under Indian Child Welfare Act; withdrawal of consent

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Indians](#)  [134\(1\)](#)

Under the Indian Child Welfare Act (ICWA), voluntary consent to foster care placement or to the termination of parental rights regarding an Indian child, by any parent or Indian custodian, must be in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the judge's certification that the terms and consequences of the consent were fully explained and fully understood by the parent or Indian custodian, and any consent given prior to, or within 10 days after, birth is invalid.¹

In a foster care placement matter, the parent or Indian custodian may withdraw consent under state law at any time, and upon withdrawal, the child must be returned to the parent or Indian custodian.²

In any voluntary proceeding for the termination of parental rights to, or adoptive placement of, an Indian child, the parent may withdraw consent for any reason at any time prior to the entry of a final decree of termination or adoption and obtain return of the child.³

Whenever the parents of an Indian child voluntarily consent to the termination of their parental rights to the child, the biological parents or prior Indian custodians may petition for return of custody and the court must grant such petition unless it is shown that return of custody is not in the best interest of the child.⁴

The tribe is not entitled to notice of a voluntary adoption proceeding by the birth mother under the ICWA when the mother's right of anonymity and confidentiality outweigh the tribe's interests.⁵

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Footnotes

- 1 25 U.S.C.A. § 1913(a).
- 2 25 U.S.C.A. § 1913(b).
- 3 25 U.S.C.A. § 1913(c).
- 4 25 U.S.C.A. § 1916(a).
- 5 In re Adoption of Baby Boy J., 37 Misc. 3d 198, 944 N.Y.S.2d 871 (Sur. Ct. 2012).

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B. Indian Child Welfare and Custody; Indian Child Welfare Act

3. Foster Placement or Termination of Parental Rights Under Indian Child Welfare Act

b. Involuntary Proceedings Under Indian Child Welfare Act

(1) Foster Placement or Termination of Parental Rights Under Indian Child Welfare Act

§ 109. Definitions under Indian Child Welfare Act

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Under the Indian Child Welfare Act (ICWA),¹ "termination of parental rights" means any action resulting in the termination of the parent-child relationship.² A termination, for this purpose, is a permanent ending of the parent-child relationship, instead of a temporary removal.³

For purposes of the involuntary termination of parental rights under the ICWA, "continued custody" refers to custody the parent already has, or at least had at some point in the past,⁴ and refers to legal custody rather than physical custody.⁵

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- ¹ 25 U.S.C.A. §§ 1901 et seq.
- ² 25 U.S.C.A. § 1903(1)(ii).
- ³ *Thompson v. Fairfax County Dept. of Family Services*, 62 Va. App. 350, 747 S.E.2d 838 (2013).
- ⁴ *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 186 L. Ed. 2d 729 (2013).
- ⁵ *In re W.D.H.*, 43 S.W.3d 30 (Tex. App. Houston 14th Dist. 2001).

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3. Foster Placement or Termination of Parental Rights Under Indian Child Welfare Act

b. Involuntary Proceedings Under Indian Child Welfare Act

(1) Foster Placement or Termination of Parental Rights Under Indian Child Welfare Act

§ 110. Heightened standards under Indian Child Welfare Act

[Topic Summary](#) | [Correlation Table](#) | [References](#)

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West's Key Number Digest, [Indians](#)  [134\(1\)](#), [134\(2\)](#)

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[Construction and Application by State Courts of Indian Child Welfare Act of 1978 Requirement of Active Efforts to Provide Remedial Services, 25 U.S.C.A. s 1912\(d\), 61 A.L.R.6th 521](#)

Trial Strategy

[Grounds for Termination of Parental Rights, 32 Am. Jur. Proof of Facts 3d 83§ 1.4](#)

When an Indian child¹ is involved in a court proceeding for the termination of parental rights, the Indian Child Welfare Act (ICWA),² imposes heightened requirements³ regardless whether the tribe intervenes.⁴ The ICWA's procedural and substantive

requirements must be followed,⁵ in addition to state law requirements,⁶ but the ICWA's minimum standards must prevail over state standards.⁷

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under state law must satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.⁸ The requirement applies only when an Indian family's breakup would be precipitated by the termination of parental rights and does not apply when the Indian parent abandoned the child prior to birth and never had legal or physical custody or any relationship that was discontinued or ended by the termination of parental rights.⁹ An order of termination is subject to invalidation for failure to comply with the "active efforts" requirement.¹⁰ The ICWA does not, however, require consideration of placement options in determining whether to terminate parental rights.¹¹

No foster care placement¹² or termination of parental rights may be ordered in the absence of a determination that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.¹³ The termination order requires this finding for validity under the ICWA,¹⁴ and it may not be replaced with a finding limited to the child's best interests.¹⁵

The requirement that a parent's voluntary consent to the termination of parental rights be reduced to writing with court approval, applies only to voluntary termination proceedings¹⁶ and does not apply to involuntary proceedings.¹⁷

The ICWA requirements are inapplicable if it is determined that the child is not an Indian child¹⁸ or that the breakup of an Indian family is not involved.¹⁹

Observation:

Nothing in the ICWA may be construed to prevent the emergency removal of an Indian child in order to prevent imminent physical damage or harm to the child.²⁰

CUMULATIVE SUPPLEMENT

Cases:

In termination of parental rights action involving Indian children, superior court did not err in finding that Office of Children's Services (OCS) made active efforts toward reunification of mother with her children; caseworker maintained in-person visits with mother after she moved, OCS followed up on doctor's recommendations by referring mother for a psychological evaluation specific to mother's ability to parent, OCS set up monthly visitation between mother and her children and referred mother to family therapy counselor to establish visitation plan, mother's mental health problems were of long standing and she had done little to address them, and mother received extensive resources directly from OCS, including case planning, frequent and in-person support from caseworkers, monthly therapeutic visitation with children, and referrals for both neuropsychological and

psychological evaluations. Indian Child Welfare Act of 1978, § 102(d), 25 U.S.C.A. § 1912(d). *Denny M. v. State, Dept. of Health & Social Services*, 365 P.3d 345 (Alaska 2016).

Arizona tribal court's failure to give notice to the parties when it issued an ex parte order making American Indian child a ward of the tribal court precluded giving order full faith and credit under ICWA in Ohio juvenile court in which guardian ad litem had brought an action alleging that child was neglected, abused, and dependent. Indian Child Welfare Act of 1978 § 101, 25 U.S.C.A. § 1911(d). *Matter of C.J., Jr.*, 2018-Ohio-931, 108 N.E.3d 677 (Ohio Ct. App. 10th Dist. Franklin County 2018).

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Footnotes

- 1 § 102.
- 2 25 U.S.C.A. §§ 1901 et seq.
- 3 *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 186 L. Ed. 2d 729 (2013); *In re H.G.*, 234 Cal. App. 4th 906, 184 Cal. Rptr. 3d 323 (2d Dist. 2015).
- 4 § 116.
- 5 *People ex rel. A.R.*, 2012 COA 195M, 310 P.3d 1007 (Colo. App. 2012), as modified on denial of reh'g, (Dec. 27, 2012); *State, ex rel., Children, Youth and Families Dept. v. Marsalee P.*, 2013-NMCA-062, 302 P.3d 761 (N.M. Ct. App. 2013).
Procedural safeguards must be satisfied. *People In Interest of S.H.E.*, 2012 SD 88, 824 N.W.2d 420 (S.D. 2012).
- 6 *Grace L. v. State, Dept. of Health & Social Services, Office of Children's Services*, 329 P.3d 980 (Alaska 2014); *In re K.S.*, 448 S.W.3d 521 (Tex. App. Tyler 2014), review denied, (Dec. 5, 2014).
- 7 *People ex rel. A.R.*, 2012 COA 195M, 310 P.3d 1007 (Colo. App. 2012), as modified on denial of reh'g, (Dec. 27, 2012); *State, ex rel., Children, Youth and Families Dept. v. Marsalee P.*, 2013-NMCA-062, 302 P.3d 761 (N.M. Ct. App. 2013).
- 8 25 U.S.C.A. § 1912(d).
Reasonable active, but unsuccessful, efforts included referring the mother to substance abuse assessments, mental health counseling, parenting classes, and domestic violence counseling, and providing transportation assistance, arranged family visits, random urinalysis tests, case plans, and attempts to locate the mother when contact was lost. *Sylvia L. v. State, Dept. of Health and Social Services, Office of Children's Services*, 343 P.3d 425 (Alaska 2015).
Remedial efforts were reasonable in the face of the parent's demonstrated unwillingness to participate or cooperate and long periods without contact. *Ben M. v. State, Dept. of Health and Social Services, Office of Children's Services*, 204 P.3d 1013 (Alaska 2009), as amended on reh'g, (Apr. 21, 2009).
- 9 *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 186 L. Ed. 2d 729 (2013).
- 10 *In re K.B.*, 2013 MT 133, 370 Mont. 254, 301 P.3d 836 (2013); *In re K.S.*, 448 S.W.3d 521 (Tex. App. Tyler 2014), review denied, (Dec. 5, 2014).
- 11 *Roy S. v. State, Dept. of Health & Social Services, Office of Children's Services*, 278 P.3d 886 (Alaska 2012).
A violation of ICWA placement preferences does not invalidate a termination order. *David S. v. State, Dept. of Health & Social Services*, 270 P.3d 767 (Alaska 2012).
- 12 25 U.S.C.A. § 1912(e).
- 13 25 U.S.C.A. § 1912(f).
The requirement is not limited to cases when the biological parent has custody at the start of the proceeding. *In re Welfare of Child of E.A.C.*, 812 N.W.2d 165 (Minn. Ct. App. 2012).
- 14 *Grace L. v. State, Dept. of Health & Social Services, Office of Children's Services*, 329 P.3d 980 (Alaska 2014); *In re Welfare of Child of E.A.C.*, 812 N.W.2d 165 (Minn. Ct. App. 2012).
- 15 *In re Welfare of Child of E.A.C.*, 812 N.W.2d 165 (Minn. Ct. App. 2012).

16 § 108.
17 In re D.A., 2013 MT 191, 371 Mont. 46, 305 P.3d 824 (2013).
18 In re F.O., 2014 IL App (1st) 140954, 387 Ill. Dec. 411, 22 N.E.3d 456 (App. Ct. 1st Dist. 2014); State, ex rel.,
19 Children, Youth and Families Dept. v. Marsalee P., 2013-NMCA-062, 302 P.3d 761 (N.M. Ct. App. 2013).
20 In re ARW, 2015 WY 25, 343 P.3d 407 (Wyo. 2015).
25 U.S.C.A. § 1922.

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41 Am. Jur. 2d Indians; Native Americans § 111

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West's Key Number Digest

West's Key Number Digest, [Indians](#)  134(1)

In a proceeding under the Indian Child Welfare Act (ICWA) to terminate parental rights, the required determination of likely serious emotional or physical damage to the child must be supported by evidence beyond a reasonable doubt.¹ For a foster care proceeding, the standard of likely serious emotional or physical damage is clear and convincing evidence.²

In a proceeding to terminate parental rights, clear and convincing evidence must also establish that active efforts were made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that those efforts were unsuccessful.³

CUMULATIVE SUPPLEMENT

Cases:

Trial court did not clearly err in finding that father failed to remedy the conduct or conditions placing child in need of aid, in terminating parental rights to a child subject to the Indian Child Welfare Act (ICWA), where father failed to remedy his heroin abuse despite substantial efforts by the Department of Health and Social Services, Office of Children's Services (OCS) to provide remedial services and rehabilitative programs, and father spent time in jail both before OCS took custody of the child and during the period in which OCS was working with father on his substance abuse issues. [Alaska St. § 47.10.088\(a\)\(2\)](#); Child in Need of Aid Rules, Rule 18(c)(1)(A). *Ray R. v. State*, 386 P.3d 1225 (Alaska 2016).

Juvenile court's order placing dependent Indian child with her paternal grandmother, rather than with her maternal aunt, complied with placement preferences under ICWA and state statute governing placement of Indian children, and thus court was not required to find good cause to place child with her grandmother, despite Indian tribe's preference for placement with aunt; grandmother was a member of child's extended family and coequal to aunt under statutory placement preference order, and tribe's placement preference was merely a factor for court's consideration in its placement decision. Indian Child Welfare Act of 1978 § 105, 25 U.S.C.A. §§ 1903, 1905(b), 1915(c); 25 C.F.R. § 23.131; Cal. Welf. & Inst. Code §§ 300, 361.31(b); Cal. R. Ct. 5.484. *In re A.F.*, 18 Cal. App. 5th 833, 2017 WL 6603423 (4th Dist. 2017).

Trial court violated ICWA when it terminated mother's parental rights before having conclusive determination of children's status in Indian tribe; trial court had reason to believe that children were Indian children who might be eligible for enrollment in an Indian tribe, there was no indication that tribe received notice of termination proceedings for either child, and trial court failed to confirm that due diligence was used to work with tribe. Indian Child Welfare Act of 1978 §§ 3, 102, 25 U.S.C.A. §§ 1902, 1912(a); Mont. Code Ann. §§ 41-3-109, 41-3-609, 41-3-609(1)(f); 25 C.F.R. § 23.11(a). *Matter of L.A.G.*, 2018 MT 255, 429 P.3d 629 (Mont. 2018).

Indian Child Welfare Act (ICWA) did not apply in proceedings to terminate mother's parental rights, even though mother asserted that her children had native American ancestry; Native American ancestry alone could not meet any factors of the ICWA definition of an Indian child, mother did not show that the children met the statutory definition of Indian children, mother did not show that children were eligible for tribe membership, and juvenile court satisfied its burden under ICWA to ask proceeding participants at the beginning of the case whether they knew or had reason to know that the children were Indian children. 25 C.F.R. § 23.107(c). *In re E.C.*, 2020-Ohio-3807, 156 N.E.3d 375 (Ohio Ct. App. 8th Dist. Cuyahoga County 2020).

[END OF SUPPLEMENT]

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Footnotes

- 1 25 U.S.C.A. § 1912(f).
Sufficient evidence was presented by the reasonable doubt standard. *Marcia V. v. State*, 201 P.3d 496 (Alaska 2009).
Testimony of risk, rather than likelihood, is insufficient to meet the reasonable doubt standard. *In re K.B.*, 2013 MT 133, 370 Mont. 254, 301 P.3d 836 (2013).
In applying the beyond a reasonable doubt standard of proof, the trial court is not required to specifically cite that standard of proof. *In re M.R.G.*, 2004 MT 172, 322 Mont. 60, 97 P.3d 1085 (2004); *In re M.J.J.*, 2003 OK CIV APP 43, 69 P.3d 1226 (Div. 1 2003).
- 2 25 U.S.C.A. § 1912(e).
- 3 25 U.S.C.A. § 1912(d).
Sufficient evidence was presented by the clear and convincing standard. *Sylvia L. v. State, Dept. of Health and Social Services, Office of Children's Services*, 343 P.3d 425 (Alaska 2015).

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41 Am. Jur. 2d Indians; Native Americans § 112

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§ 112. Expert witnesses under Indian Child Welfare Act

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West's Key Number Digest

West's Key Number Digest, [Indians](#)  134(1), 134(4)

Under the Indian Child Welfare Act (ICWA),¹ the court's determination ordering a foster care placement² or terminating parental rights must be supported by the testimony of qualified expert witnesses that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.³ The requirement only means that the expert testimony must support the court's conclusion, not that it must provide the sole basis for it.⁴ The testimony must also be forward looking, relating to the likelihood of future harm, and not limited to past harm.⁵

The sufficiency of the expert testimony is a pure question of law⁶ while the court's decision whether to admit particular expert testimony is a matter of the court's sound exercise of discretion.⁷

Expert testimony may serve to educate a court about tribal customs and childrearing practices and to diminish any risk of cultural bias.⁸ For this purpose, an expert may be one qualified regarding Native American families and their childrearing practices⁹ with established knowledge of Indian culture, family structure, and childrearing practices.¹⁰

Expertise in native culture¹¹ or special knowledge of Indian life is not necessary when a professional person has substantial education and experience¹² and testifies on matters not implicating cultural bias.¹³ An expert need not have familiarity with tribal culture in order to qualify as an expert regarding addictions, violent behavior, incarceration, the inability to provide a stable home, neglect, exposure to sex offenders, domestic violence, and abandonment, absent any suggestion of cultural bias

or differing tribal standards of child care.¹⁴ Tribal customs and prevailing tribal social and cultural norms are not relevant, for this purpose, in considering a parent's inability to provide a stable home or the likelihood of triggering further harm from past sexual abuse.¹⁵

CUMULATIVE SUPPLEMENT

Cases:

Given caseworker's extensive knowledge and experience, coupled with the fact that she was a member of the Indian tribe, any challenge to caseworker's qualification as an expert would have been futile, and trial court did not clearly err by considering caseworker's testimony in action to terminate father's parental rights to Indian child; caseworker expressed her independent expert opinion that child would be subject to future harm if returned to father's care and merely elaborated that the tribe's child welfare committee shared the same opinion. Indian Child Welfare Act of 1978, § 2 et seq., 25 U.S.C.A. § 1901 et seq.; M.C.L.A. § 712B.17. *In re England*, 314 Mich. App. 245, 887 N.W.2d 10 (2016).

[END OF SUPPLEMENT]

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Footnotes

- 1 25 U.S.C.A. §§ 1901 et seq.
- 2 25 U.S.C.A. § 1912(e).
- 3 25 U.S.C.A. § 1912(f).
- 4 *Steven H. v. Arizona Dept. of Economic Security*, 218 Ariz. 566, 190 P.3d 180 (2008); *In re J.S.*, 2014 MT 79, 374 Mont. 329, 321 P.3d 103 (2014).
- 5 *Steven H. v. Arizona Dept. of Economic Security*, 218 Ariz. 566, 190 P.3d 180 (2008).
- 6 *Chloe W. v. State, Dept. of Health & Social Services, Office of Children's Services*, 336 P.3d 1258 (Alaska 2014).
- 7 *Sylvia L. v. State, Dept. of Health and Social Services, Office of Children's Services*, 343 P.3d 425 (Alaska 2015).
- 8 *Steven H. v. Arizona Dept. of Economic Security*, 218 Ariz. 566, 190 P.3d 180 (2008).
- 9 *People ex rel. M.H.*, 2005 SD 4, 691 N.W.2d 622 (S.D. 2005).
A child welfare specialist for the Cherokee Nation is a qualified expert witness. *In re E.P.F.L., Jr.*, 2011 OK CIV APP 112, 265 P.3d 764 (Div. 2 2011).
- 10 *In re K.S.*, 2003 MT 212, 317 Mont. 88, 75 P.3d 325 (2003).
- 11 *In re Candace A.*, 332 P.3d 578 (Alaska 2014).
- 12 *Steven H. v. Arizona Dept. of Economic Security*, 218 Ariz. 566, 190 P.3d 180 (2008).
- 13 *Marcia V. v. State*, 201 P.3d 496 (Alaska 2009); *In re Guardianship of LNP*, 2013 WY 20, 294 P.3d 904 (Wyo. 2013).
- 14 *Marcia V. v. State*, 201 P.3d 496 (Alaska 2009).
- 15 *In re Guardianship of LNP*, 2013 WY 20, 294 P.3d 904 (Wyo. 2013).

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§ 113. Requirement of notice to tribe under Indian Child Welfare Act

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West's Key Number Digest

West's Key Number Digest, [Indians](#)  134(5)

The Indian Child Welfare Act (ICWA) provides that, in an involuntary proceeding in state court, when the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child must notify the parent or Indian custodian and the child's tribe by registered mail, return receipt requested, of the pending proceedings and their right of intervention.¹ If the identity or location of the parent or Indian custodian and tribe is uncertain, the ICWA requires notice to the Secretary of the Interior who then has the burden of notifying the tribe.² The notice requirement is mandatory and preempts state law.³

The notice requirement applies only to federally recognized tribes⁴ and does not violate equal protection or due process of law.⁵

Practice Tip:

The notice requirement cannot be waived or forfeited by the parent⁶ and is not waived by a parent's failure to object in trial court.⁷ Parents may first raise the applicability of the ICWA's notice requirement on appeal.⁸

The notice requirement is a key component of the congressional goal of serving the interests of Indian tribes, irrespective of the position of the parents.⁹ It enables an Indian tribe to investigate and determine whether the minor is an Indian child and consider its right to intervene¹⁰ and therefore must contain enough information to permit the tribe to conduct a meaningful review of its records.¹¹ Sufficient notice to the tribe, however, does not require a demand by the court or State for the notified tribe to respond.¹²

Practice Tip:

Compliance requires the court to, at minimum, include in the record (1) the original or a copy of the actual notice sent by registered mail pursuant to statute, and (2) the original or a legible copy of the return receipt or other proof of service.¹³

CUMULATIVE SUPPLEMENT

Cases:

Mother could challenge order terminating her parental rights on the ground that the juvenile court erred in finding Indian Child Welfare Act of 1978 (ICWA) notice unnecessary, even if mother failed to object at prior jurisdictional and dispositional hearing where juvenile court found that ICWA notice was unnecessary and mother could not appeal that finding; order terminating parental rights was necessarily premised on a current finding that court had no reason to know child was an Indian child, but juvenile court had a continuing duty to inquire whether child was an Indian child in all dependency proceedings, even if mother did not submit any new information; disapproving *In re Pedro N.*, 35 Cal.App.4th 183, 41 Cal.Rptr.2d 819. Indian Child Welfare Act of 1978, § 102(a), 25 U.S.C.A. § 1912(a); West's Ann.Cal.Welf. & Inst.Code § 224.2. *In re Isaiah W.*, 203 Cal. Rptr. 3d 633, 373 P.3d 444 (Cal. 2016).

Evidence established that tribe in which child was enrolled was given proper notice of termination-of-parental-rights proceedings; affidavit of mailing notice from a legal secretary in county attorney's office provided that notice was mailed, by certified mail, return receipt requested, to certain post office box on a specified date and evidence showed post office box was the same address listed on the certificate of Indian blood submitted by the State and which certified that child was an enrolled member of the tribe and that two notices were mailed to the tribe at the post office box and that the return receipt was signed and returned in both instances from that address. Neb. Rev. Stat. § 43-1505(1). *In re Interest of Audrey T.*, 26 Neb. App. 822, 924 N.W.2d 72 (2019).

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Footnotes

- 1 25 U.S.C.A. § 1912(a).
- 2 25 U.S.C.A. § 1912(a).
- 3 G.L. v. Department of Children and Families, 80 So. 3d 1065 (Fla. 5th DCA 2012).
- 4 In re A.C., 155 Cal. App. 4th 282, 65 Cal. Rptr. 3d 767 (3d Dist. 2007); In re Welfare of L.N.B.-L., 157 Wash. App. 215, 237 P.3d 944 (Div. 2 2010).
- 5 In re Suzanna L., 104 Cal. App. 4th 223, 127 Cal. Rptr. 2d 860 (4th Dist. 2002).
Due process is not denied on a remand to ensure compliance with the notice requirement. In re Morris, 300 Mich. App. 95, 832 N.W.2d 419 (2013) appeal denied, 494 Mich. 851, 829 N.W.2d 883 (2013).
- 6 Guardianship of D.W., 221 Cal. App. 4th 242, 164 Cal. Rptr. 3d 414 (1st Dist. 2013); In re N.L., 2014 IL App (3d) 140172, 384 Ill. Dec. 924, 17 N.E.3d 906 (App. Ct. 3d Dist. 2014).
- 7 G.L. v. Department of Children and Families, 80 So. 3d 1065 (Fla. 5th DCA 2012); In re H.T., 2015 MT 41, 378 Mont. 206, 343 P.3d 159 (2015).
- 8 In re D.W., 193 Cal. App. 4th 413, 122 Cal. Rptr. 3d 460 (3d Dist. 2011); G.L. v. Department of Children and Families, 80 So. 3d 1065 (Fla. 5th DCA 2012); In re H.T., 2015 MT 41, 378 Mont. 206, 343 P.3d 159 (2015).
The error was not preserved for appeal when the parent did not raise it in trial court. Hall v. Arkansas Dept. of Human Services, 2012 Ark. App. 245, 413 S.W.3d 542 (2012).
- 9 Guardianship of D.W., 221 Cal. App. 4th 242, 164 Cal. Rptr. 3d 414 (1st Dist. 2013).
- 10 Guardianship of D.W., 221 Cal. App. 4th 242, 164 Cal. Rptr. 3d 414 (1st Dist. 2013).
- 11 In re S.E., 217 Cal. App. 4th 610, 158 Cal. Rptr. 3d 497 (2d Dist. 2013).
- 12 In re Morris, 300 Mich. App. 95, 832 N.W.2d 419 (2013), appeal denied, 494 Mich. 851, 829 N.W.2d 883 (2013).
- 13 In re N.L., 2014 IL App (3d) 140172, 384 Ill. Dec. 924, 17 N.E.3d 906 (App. Ct. 3d Dist. 2014); In re Morris, 491 Mich. 81, 815 N.W.2d 62 (2012).

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§ 114. Construction and effect of Indian Child Welfare Act notice requirement

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West's Key Number Digest

West's Key Number Digest, [Indians](#)  134(5)

The notice requirements under the Indian Child Welfare Act (ICWA) are strictly construed,¹ requiring strict compliance² or strict adherence³ although some courts have accepted only substantial compliance in the face of actual notice, appearance, and participation.⁴

Observation:

Guidelines published by the Bureau of Indian Affairs to assist state courts in determining whether notice of a child custody proceeding is required to be given to a tribe under the ICWA are not binding on state courts but they have been considered persuasive.⁵

A notice violation is not jurisdictional,⁶ and does not invalidate the court's order,⁷ but does render the court's order voidable⁸ and subject to collateral attack.⁹ The error may require reversal¹⁰ if the objecting party can show a reasonable probability that a more favorable result would have been obtained in the absence of the error.¹¹ Deficient notice is usually prejudicial error,¹² but may constitute harmless error,¹³ as when actual notice overcomes the failure¹⁴ or it appears that the child would not have been found to be an Indian child.¹⁵ If notice is the sole issue, a remand for the giving of proper notice is ordinarily the correct course.¹⁶

CUMULATIVE SUPPLEMENT

Cases:

Process developed by state court judge for 48-hour hearings on removal of Indian children from homes, and implemented by state department of social services and its employees, violated due process rights of parents; judge and social services employees failed to protect Indian parents' fundamental rights to a fair hearing by not providing adequate notice, not allowing them to present evidence to contradict state's removal documents, not allowing parents to confront and cross-examine social services witnesses, using documents as a basis for court's decisions which were not provided to parents and which were not received in evidence at the 48-hour hearings. *U.S.C.A. Const.Amend. 14. Oglala Sioux Tribe v. Van Hunnik*, 100 F. Supp. 3d 749 (D.S.D. 2015).

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Footnotes

- 1 [Guardianship of D.W.](#), 221 Cal. App. 4th 242, 164 Cal. Rptr. 3d 414 (1st Dist. 2013).
- 2 [In re M.S.](#), 2014 MT 265, 376 Mont. 394, 336 P.3d 930 (2014), as amended, (Nov. 12, 2014).
- 3 [In re Karla C.](#), 113 Cal. App. 4th 166, 6 Cal. Rptr. 3d 205 (4th Dist. 2003).
- 4 [In re Parental Rights as to S.M.M.D.](#), 272 P.3d 126, 128 Nev. Adv. Op. No. 2 (Nev. 2012).
- 5 [People ex rel. J.C.R.](#), 259 P.3d 1279 (Colo. App. 2011).
- 6 [In re Christian P.](#), 208 Cal. App. 4th 437, 144 Cal. Rptr. 3d 533 (2d Dist. 2012), as modified on denial of reh'g, (Aug. 21, 2012); [In re Parental Rights as to S.M.M.D.](#), 272 P.3d 126, 128 Nev. Adv. Op. No. 2 (Nev. 2012).
- 7 [In re K.S.](#), 448 S.W.3d 521 (Tex. App. Tyler 2014), review denied, (Dec. 5, 2014).
- 8 [In re Johnson](#), 305 Mich. App. 328, 852 N.W.2d 224 (2014).
The parent may petition to have the order invalidated. [In re K.B.](#), 2013 MT 133, 370 Mont. 254, 301 P.3d 836 (2013).
- 9 [In re Dependency of T.L.G.](#), 126 Wash. App. 181, 108 P.3d 156 (Div. 1 2005).
- 10 [G.L. v. Department of Children and Families](#), 80 So. 3d 1065 (Fla. 5th DCA 2012); [In re F.O.](#), 2014 IL App (1st) 140954, 387 Ill. Dec. 411, 22 N.E.3d 456 (App. Ct. 1st Dist. 2014).
The order is vacated and the proceeding remanded for invalid notice. [In re Nery V.](#), 20 Neb. App. 798, 832 N.W.2d 909 (2013).
- 11 [In re Christian P.](#), 208 Cal. App. 4th 437, 144 Cal. Rptr. 3d 533 (2d Dist. 2012), as modified on denial of reh'g, (Aug. 21, 2012); [In re M.S.](#), 2014 MT 265, 376 Mont. 394, 336 P.3d 930 (2014), as amended, (Nov. 12, 2014).
- 12 [In re L.S., Jr.](#), 230 Cal. App. 4th 1183, 179 Cal. Rptr. 3d 316 (3d Dist. 2014).
- 13 [Molly O. v. State, Dept. of Health and Social Services, Office of Children's Services](#), 320 P.3d 303 (Alaska 2014); [In re People ex rel. A.R.Y.-M.](#), 230 P.3d 1259 (Colo. App. 2010); [In re M.S.](#), 2014 MT 265, 376 Mont. 394, 336 P.3d 930 (2014), as amended, (Nov. 12, 2014).
- 14 [In re Autumn K.](#), 221 Cal. App. 4th 674, 164 Cal. Rptr. 3d 720 (1st Dist. 2013); [In re K.S.](#), 448 S.W.3d 521 (Tex. App. Tyler 2014), review denied, (Dec. 5, 2014).

- 15 [Hall v. Arkansas Dept. of Human Services](#), 2012 Ark. App. 245, 413 S.W.3d 542 (2012); [In re D.N.](#), 218 Cal. App. 4th 1246, 161 Cal. Rptr. 3d 151 (2d Dist. 2013).
- 16 [In re L.S., Jr.](#), 230 Cal. App. 4th 1183, 179 Cal. Rptr. 3d 316 (3d Dist. 2014); [In re Morris](#), 491 Mich. 81, 815 N.W.2d 62 (2012).

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§ 115. Indian child status as trigger for Indian Child Welfare Act notice requirement

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West's Key Number Digest

West's Key Number Digest, [Indians](#)  134(5)

The "minimal showing" required to trigger the requirement of notice under the Indian Child Welfare Act (ICWA) is evidence suggesting the minor may be an Indian child within the purview of the ICWA.¹ The Indian status of the child need not be certain in order to trigger the notice requirement.² The notice threshold is satisfied when the trial court has "reason to know" that the child is an "Indian child."³ A suggestion of Indian ancestry may trigger the notice requirement.⁴ Sufficient information would include any reliable information on virtually any criteria by which Indian tribal membership might be based.⁵

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Footnotes

¹ [In re Giovanni B.](#), 221 Cal. App. 4th 1482, 165 Cal. Rptr. 3d 430 (2d Dist. 2013); [In re Johnson](#), 305 Mich. App. 328, 852 N.W.2d 224 (2014).

An unsigned "Parental Notification of Indian Status" form from the child's biological father is sufficient to trigger an inquiry. [In re Gabriel G.](#), 206 Cal. App. 4th 1160, 142 Cal. Rptr. 3d 344 (2d Dist. 2012).

As to who is an "Indian child" under the ICWA, see § 102.

² [Guardianship of D.W.](#), 221 Cal. App. 4th 242, 164 Cal. Rptr. 3d 414 (1st Dist. 2013).

An acknowledged father who claims possible Indian heritage need not provide genetic testing data as proof to trigger the notice requirement. [In re A.G.](#), 204 Cal. App. 4th 1390, 139 Cal. Rptr. 3d 727 (1st Dist. 2012), as modified, (Apr. 20, 2012).

- 3 People ex rel. J.C.R., 259 P.3d 1279 (Colo. App. 2011); G.L. v. Department of Children and Families, 80
So. 3d 1065 (Fla. 5th DCA 2012); In re Guardianship of LNP, 2013 WY 20, 294 P.3d 904 (Wyo. 2013).
4 In re J.M., 206 Cal. App. 4th 375, 141 Cal. Rptr. 3d 738 (2d Dist. 2012).
5 In re Morris, 491 Mich. 81, 815 N.W.2d 62 (2012).
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b. Involuntary Proceedings Under Indian Child Welfare Act

(3) Intervention in Involuntary Proceedings Under Indian Child Welfare Act

§ 116. Right to intervene in involuntary Indian Child Welfare Act proceedings

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West's Key Number Digest

West's Key Number Digest, [Indians](#)  134(5)

The Indian Child Welfare Act (ICWA) provides that in any state court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe have a right to intervene at any point in the proceeding¹ and must be afforded notice of the opportunity to do so.² Intervention is optional and a tribe may elect not to intervene even after determining that the child in question is a member of the concerned Indian Nation.³

Actual intervention by the tribe precludes the issue of strict compliance with the notice provision of the ICWA⁴ and remedies the error.⁵

An Indian tribe does not waive its right to intervene unless it explicitly states that it will not intervene.⁶ A tribe's statement, however, in response to a notice of pending proceedings, that the child in question is not enrolled in the tribe and is not eligible for enrollment, is the equivalent of a statement indicating that the tribe will not intervene in the proceeding.⁷

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Footnotes

¹ 25 U.S.C.A. § 1911(c).

There is no tribal right to intervene if the child is not a member of the tribe, as opposed to a "member of the tribe's community." *In re A.P.*, 760 N.W.2d 210 (Iowa Ct. App. 2008).

§ 113.

In re Guardianship of LNP, 2013 WY 20, 294 P.3d 904 (Wyo. 2013).

In re Welfare of L.N.B.-L., 157 Wash. App. 215, 237 P.3d 944 (Div. 2 2010).

In re M.B., 39 Kan. App. 2d 31, 176 P.3d 977 (2008).

People ex rel. T.M.W., 208 P.3d 272 (Colo. App. 2009).

In re People ex rel. A.R.Y.-M., 230 P.3d 1259 (Colo. App. 2010).

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41 Am. Jur. 2d Indians; Native Americans § 117

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B. Indian Child Welfare and Custody; Indian Child Welfare Act

3. Foster Placement or Termination of Parental Rights Under Indian Child Welfare Act

c. Placement for Foster Care, Preadoption, and Adoption; Indian Child Welfare Act Preferences

§ 117. Alternative placement forms; general Indian Child Welfare Act preferences

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West's Key Number Digest

West's Key Number Digest, [Indians](#)  [134\(1\)](#), [134\(4\)](#), [136](#), [138](#)

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[Validity, Construction, and Application of Placement Preferences of State and Federal Indian Child Welfare Acts](#), 63 A.L.R.6th 429

The Indian Child Welfare Act (ICWA) addresses and defines three forms of child placement in child custody proceedings: "foster care placement,"¹ "preadoptive placement,"² and "adoptive placement."³

In any adoptive placement of an Indian child under state law, a preference will be given, in the absence of good cause to the contrary, to a placement with: (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.⁴

For foster care or preadoptive placements, the ICWA requires placement in the least restrictive setting which most approximates a family and in which the Indian child's special needs, if any, may be met, including placement within reasonable proximity to the child's home, taking into account any special needs of the child, giving preference to placements, in the absence of good cause to the contrary, with: (1) a member of the Indian child's extended family; (2) a foster home licensed, approved, or specified

by the Indian child's tribe; (3) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (4) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.⁵ A placement that presents a geographical barrier to visitation is presumptively not within reasonable proximity to the child's home.⁶

The standards to be applied in meeting the preference requirements are the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.⁷

The ICWA placement preferences do not violate equal protection or due process.⁸

Observation:

The ICWA adoptive placement preferences do not bar a non-Indian family from adopting an Indian child when no other eligible candidates have sought to adopt the child.⁹ When the adoption of an Indian child is voluntarily and lawfully initiated by a non-Indian parent with sole custodial rights, the ICWA primary goal of preventing unwarranted removal of Indian children and the dissolution of Indian families is not implicated.¹⁰

A "tribal customary adoption," as defined by state law, is an alternative to a standard adoption and protects the interests of both the tribe and the child in maintaining tribal membership by formalizing an adoption by an individual selected by the tribe without terminating parental rights.¹¹ It is only an option when the tribe identifies it and is not required under the ICWA, providing a higher standard of protection than the ICWA.¹²

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Footnotes

- 1 25 U.S.C.A. § 1903(1)(iii).
- 2 25 U.S.C.A. § 1903(1)(i).
- 3 25 U.S.C.A. § 1903(1)(iv).
- 4 25 U.S.C.A. § 1915(a).
- 5 25 U.S.C.A. § 1915(b).
- 6 *In re Anthony T.*, 208 Cal. App. 4th 1019, 146 Cal. Rptr. 3d 124 (4th Dist. 2012).
- 7 25 U.S.C.A. § 1915(d).
- 8 *In re Alexandria P.*, 228 Cal. App. 4th 1322, 176 Cal. Rptr. 3d 468 (2d Dist. 2014), review denied, (Oct. 29, 2014).
- 9 *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 186 L. Ed. 2d 729 (2013); *Native Village of Tununak v. State, Dept. of Health & Social Services, Office of Children's Services*, 334 P.3d 165 (Alaska 2014).
- 10 *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 186 L. Ed. 2d 729 (2013).
- 11 *In re I.P.*, 226 Cal. App. 4th 1516, 173 Cal. Rptr. 3d 257 (4th Dist. 2014).

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[In re G.C., Jr., 216 Cal. App. 4th 1391, 157 Cal. Rptr. 3d 826 \(3d Dist. 2013\).](#)

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41 Am. Jur. 2d Indians; Native Americans § 118

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§ 118. Good cause deviation from Indian Child Welfare Act preferences

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West's Key Number Digest

West's Key Number Digest, [Indians](#)  [134\(1\)](#), [134\(4\)](#), [136](#), [138](#)

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[Validity, Construction, and Application of Placement Preferences of State and Federal Indian Child Welfare Acts](#), 63 A.L.R.6th 429

The statutory placement preferences for Indian children under the Indian Child Welfare Act¹ are subject to a finding of good cause to the contrary.² The Indian tribe's consent to the placement is not sufficient for this purpose as it is not a waiver of the placement preferences.³

The party proposing to deviate from the placement guidelines must establish good cause to do so by clear and convincing evidence that the child would suffer serious harm as a result of following the preferences⁴ or that extraordinary needs of the child warrant a deviation.⁵ The best interests of the child is the paramount criterion,⁶ including the ICWA's expressed presumption that it is in an Indian child's best interests to be placed in conformance with the preferences⁷ and to retain tribal ties and tribal cultural heritage.⁸ Other factors to be considered include those set forth in the statutes and the Bureau of Indian Affairs Guidelines, but the guidelines are not exclusive and are not binding.⁹ Factors include, but are not necessarily limited to, the best interest of the

child, the wishes of the biological parents, the suitability of persons referred for placement, the child's ties to the tribe, and the child's ability to make any cultural adjustments necessitated by a particular placement.¹⁰ The application of competing factors is case-specific but always requires balancing the factors against the statutory presumptions.¹¹

CUMULATIVE SUPPLEMENT

Cases:

Designation of Indian Custodian, which transferred temporary care and custody of the minors to uncle as their Indian custodian under the Indian Child Welfare Act (ICWA) and which was executed by mother before children were taken into protective custody by the County Health and Human Services Agency, was sufficient to establish uncle as the custodian of the children under the ICWA, although tribe was not involved with the designation and mother did not have an ICWA representative sign it. Indian Child Welfare Act of 1978 § 4, 25 U.S.C.A. § 1903(6). *In re E.R.*, 244 Cal. App. 4th 866, 199 Cal. Rptr. 3d 244 (1st Dist. 2016).

Department of Social Services (DSS) had good cause for placing father's child with foster family who were not members of father's family or Native American tribe, following child's removal from mother's custody, as exception to placement preferences for child with relatives or Indian foster family, under ICWA; father's sister was only person who responded to DSS's letters by calling in to participate in planning meeting, DSS's attempts to follow-up with sister were thwarted by disconnection of her telephone and return of subsequent letters to her, father's great aunt who lived on reservation testified that she and father's other relatives from reservation received letters from DSS about child's placement and were interested in custody, but that letters stated that custodian would have to take custody of all child's siblings and not just father's child, which was untrue, none of relatives thereafter pursued custody, and DSS workers testified that their placement efforts were ongoing, that they would continue efforts post-disposition, and that they would include father's family members identified during dispositional hearing. Indian Child Welfare Act of 1978 § 105, 25 U.S.C.A. § 1915(b); 25 C.F.R. § 23.132(c)(5). *People in Interest of M.D.*, 2018 SD 78, 920 N.W.2d 496 (S.D. 2018).

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Footnotes

- 1 § 117.
- 2 25 U.S.C.A. § 1915(a), (b).
- 3 *In re Alexandria P.*, 228 Cal. App. 4th 1322, 176 Cal. Rptr. 3d 468 (2d Dist. 2014), review denied, (Oct. 29, 2014).
- 4 *In re Alexandria P.*, 228 Cal. App. 4th 1322, 176 Cal. Rptr. 3d 468 (2d Dist. 2014), review denied, (Oct. 29, 2014).
A finding of significant harm supports a deviation for good cause. *Navajo Nation v. Arizona Dept. of Economic Sec.*, 230 Ariz. 339, 284 P.3d 29 (Ct. App. Div. 1 2012), as amended, (Sept. 5, 2012).
- 5 *In re M.B.*, 2009 MT 97, 350 Mont. 76, 204 P.3d 1242 (2009).
- 6 *In re Alexandria P.*, 228 Cal. App. 4th 1322, 176 Cal. Rptr. 3d 468 (2d Dist. 2014), review denied, (Oct. 29, 2014).
- 7 *Navajo Nation v. Arizona Dept. of Economic Sec.*, 230 Ariz. 339, 284 P.3d 29 (Ct. App. Div. 1 2012), as amended, (Sept. 5, 2012); *In re Alexandria P.*, 228 Cal. App. 4th 1322, 176 Cal. Rptr. 3d 468 (2d Dist. 2014), review denied, (Oct. 29, 2014).
- 8 *In re Alexandria P.*, 228 Cal. App. 4th 1322, 176 Cal. Rptr. 3d 468 (2d Dist. 2014), review denied, (Oct. 29, 2014).

- 9 [In re Alexandria P.](#), 228 Cal. App. 4th 1322, 176 Cal. Rptr. 3d 468 (2d Dist. 2014), review denied, (Oct. 29, 2014).
- 10 [In re Adoption of Baby Boy J.](#), 37 Misc. 3d 198, 944 N.Y.S.2d 871 (Sur. Ct. 2012).
- 11 [Navajo Nation v. Arizona Dept. of Economic Sec.](#), 230 Ariz. 339, 284 P.3d 29 (Ct. App. Div. 1 2012), as amended, (Sept. 5, 2012).

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§ 119. Tribal alternative order for Indian Child Welfare Act placement preferences

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West's Key Number Digest

West's Key Number Digest, [Indians](#)  [134\(1\)](#), [134\(4\)](#), [136](#), [138](#)

The Indian Child Welfare Act permits an Indian tribe to establish a different order of placement preference for Indian children by resolution for both foster, preadoptive, and adoptive placement, so long as the placement for foster or preadoptive placement is the least restrictive setting appropriate to the particular needs of the child, and when appropriate, the preference of the Indian child or parent must be considered, including a consenting parent's desire for anonymity.¹

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Footnotes

¹ [25 U.S.C.A. § 1915\(b\)](#).

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IX. Civil and Criminal Courts and Proceedings in Indian Matters

A. Tribal Courts and Courts of Indian Offenses

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Research References

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41 Am. Jur. 2d Indians; Native Americans § 120

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IX. Civil and Criminal Courts and Proceedings in Indian Matters

A. Tribal Courts and Courts of Indian Offenses

1. General Authority for and Nature of Indian Courts

§ 120. Authority for Indian courts

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West's Key Number Digest

West's Key Number Digest, [Indians](#)  220

Courts operating on reservations include:¹

(1) tribal courts, established and functioning pursuant to tribal legislative powers;

(2) Courts of Indian Offenses or "C.F.R. Courts";

(3) traditional courts of the New Mexico Pueblos; and

(4) conservation courts.

"C.F.R. Courts," or Courts of Indian Offenses, are created pursuant to Bureau of Indian Affairs regulations to preside over tribal matters in the absence of a court established by tribal government.² Federal regulations establish the courts for Indian country or former Indian country or territory occupied by designated tribes³ and provide for civil⁴ and criminal jurisdiction,⁵ including a trial and appellate division under appointed magistrates.⁶ The court is required to keep a record of all proceedings.⁷

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Footnotes

¹ [Oliphant v. Suquamish Indian Tribe](#), 435 U.S. 191, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978).

² [Pounds v. Department of Interior](#), 9 Fed. Appx. 820 (10th Cir. 2001).

³ [25 C.F.R. §§ 11.100 et seq.](#)

4	§ 124.
5	§ 122.
6	25 C.F.R. §§ 11.200, 11.201.
7	25 C.F.R. § 11.206.

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A. Tribal Courts and Courts of Indian Offenses

1. General Authority for and Nature of Indian Courts

§ 121. Nature of Indian courts

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An Indian tribal court located within the geographic boundaries of a state is not a state court but is the court of an independent sovereign.¹ Tribal courts play a large role in promoting the federal policy of encouraging tribal sovereignty.²

The United States Constitution is generally inapplicable to tribal courts,³ but the protections afforded by the Indian Civil Rights Act do apply⁴ including protections specific to criminal proceedings.⁵

Tribal courts are not courts of general jurisdiction with respect to activities of nonmembers⁶ and have a unique, limited jurisdiction that does not extend generally to the regulation of nontribal members.⁷

CUMULATIVE SUPPLEMENT

Cases:

The Sixth Amendment does not apply to tribal-court criminal proceedings. [U.S.C.A. Const.Amend. 6. U.S. v. Bryant, 136 S. Ct. 1954 \(2016\).](#)

As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority; the Bill of Rights, including the Sixth Amendment right to counsel, therefore, does not apply in tribal-court proceedings. [U.S.C.A. Const.Amend. 6. U.S. v. Bryant, 136 S. Ct. 1954 \(2016\).](#)

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Footnotes

- 1 [In re M.M.](#), 154 Cal. App. 4th 897, 65 Cal. Rptr. 3d 273 (1st Dist. 2007).
- 2 [Iowa Mut. Ins. Co. v. LaPlante](#), 480 U.S. 9, 107 S. Ct. 971, 94 L. Ed. 2d 10 (1987); [U.S. Bancorp v. Ike](#), 171 F. Supp. 2d 1122 (D. Nev. 2001).
- 3 [U.S. v. Bryant](#), 769 F.3d 671 (9th Cir. 2014).
- 4 §§ 29 to 31.
- 5 § 125.
- 6 [Nevada v. Hicks](#), 533 U.S. 353, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001).
- 7 [Jackson v. Payday Financial, LLC](#), 764 F.3d 765 (7th Cir. 2014), petition for certiorari filed, 135 S. Ct. 1894 (2015).

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IX. Civil and Criminal Courts and Proceedings in Indian Matters

A. Tribal Courts and Courts of Indian Offenses

2. Civil Jurisdiction of Tribal Courts and Courts of Indian Offenses

§ 122. General scope of Indian court civil jurisdiction

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West's Key Number Digest

West's Key Number Digest, [Indians](#)  220, 221

Treatises and Practice Aids

[Wright and Miller's Federal Practice and Procedure, Jurisdiction and Related Matters § 3579](#)

The civil jurisdiction of tribal courts is not as federally restricted as the criminal jurisdiction of tribal courts.¹ Absent a mutual agreement for the assumption of civil jurisdiction under the specific procedure of federal and state statutes, civil jurisdiction over activities of non-Indians as well as Indians on reservation lands presumptively lies in the tribal court,² subject to limitations for the activities of non-Indians on fee lands within a reservation.³

By federal regulation, each Court of Indian Offenses, or "C.F.R. Court," has jurisdiction over any civil action arising within the territorial jurisdiction of the court in which: (1) the defendant is an Indian; or (2) other claims, provided at least one party is an Indian.⁴ The court has jurisdiction in probate matters⁵ and in marital dissolution proceedings.⁶

The nature and extent of tribal civil jurisdiction in any particular case will depend upon a number of factors, including but not limited to: (1) the extent of the federal recognition of a particular tribe as a sovereign; (2) the extent of the tribe's authority under its organic laws; (3) the tribe's delegation of authority to its tribal court; and (4) the proper exercise of subject matter and personal jurisdiction.⁷ Tribal courts have exclusive civil jurisdiction under two circumstances: included in the first category are

those claims in which a non-Indian asserts a claim against an Indian for conduct occurring on the Indian's reservation; in the second category, are those claims in which all the parties are members of the same Indian tribe and the claim involves conduct occurring on the tribe's reservation.⁸ The two categories involve only claims for conduct occurring exclusively on Indian land⁹ and involving tribal members or tribal entities.¹⁰

As a general matter, tribal courts do not have civil jurisdiction over non-Indians.¹¹ As to non-Indians, Indian tribes lack civil jurisdiction over conduct on non-Indian fee land within a reservation unless the non-Indians enter into consensual relationships within the reservation or unless the non-Indians' conduct has some direct effect on the political integrity, economic security, or health or welfare, of the tribe.¹² As to nonmembers, an Indian tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction.¹³ When tribes possess the authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumably lies in the tribal courts.¹⁴

To determine the personal jurisdiction of tribal courts over nonmember parties, the courts apply a test of minimum contacts with the reservation to conclude whether the assertion of jurisdiction offends traditional notions of fair play and substantial justice.¹⁵

The tribal court's jurisdiction is exclusive as to a real estate action in which all parties are enrolled tribe members, the property is within the reservation, all of the activities took place on the reservation, and the tribal constitution and tribal code indicate the tribal court has jurisdiction over civil matters involving tribe members and property located on the reservation.¹⁶ A tribal court may not have exclusive jurisdiction over a dispute involving patented fee land located within the exterior boundary of the Indian reservation if the land is alienated under the federal allotment acts.¹⁷

Reminder:

Tribal courts have jurisdiction of certain matters under the Indian Child Welfare Act, which may be concurrent with state courts¹⁸ and have jurisdiction in Indian divorce actions.¹⁹

Observation:

Tribal courts lack jurisdiction to adjudicate federal civil rights claims under section 1983.²⁰

CUMULATIVE SUPPLEMENT

Cases:

Operator of elemental phosphorus plant on fee land within Indian reservation had consensual relationship with tribes, and thus was subject to tribal court's jurisdiction in tribes' action to enforce its agreement to pay use permit fees for hazardous waste storage on reservation, even though Environmental Protection Agency (EPA) required it to obtain relevant permits from tribes in order to obtain consent decree to settle EPA's claims against it under Resource Conservation and Recovery Act (RCRA), where operator had strong interest in obtaining consent decree that would allow it to settle RCRA suit on favorable terms, any coercion was by EPA, not tribes, and operator should have reasonably anticipated that its interactions might trigger tribal regulatory authority. Solid Waste Disposal Act § 1002 et seq., 42 U.S.C.A. § 6901 et seq. *FMC Corporation v. Shoshone-Bannock Tribes*, 942 F.3d 916 (9th Cir. 2019).

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Footnotes

- 1 [J & M Aircraft Mobile T Hangars, Inc. v. Johnston County Airport Authority](#), 269 Ga. App. 800, 605 S.E.2d 611 (2004).
As to criminal jurisdiction, generally, see § 124.
- 2 [In re Estate of Big Spring](#), 2011 MT 109, 360 Mont. 370, 255 P.3d 121 (2011).
- 3 [Montana v. U. S.](#), 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981).
- 4 25 C.F.R. § 11.116.
- 5 § 86.
- 6 § 98.
- 7 [State v. Native Village of Tanana](#), 249 P.3d 734 (Alaska 2011).
- 8 [State v. B.B.](#), 2013 ND 242, 840 N.W.2d 651 (N.D. 2013).
- 9 [State v. B.B.](#), 2013 ND 242, 840 N.W.2d 651 (N.D. 2013).
- 10 [Doe v. Santa Clara Pueblo](#), 2007-NMSC-008, 141 N.M. 269, 154 P.3d 644 (2007).
- 11 [Crowe & Dunlevy, P.C. v. Stidham](#), 640 F.3d 1140 (10th Cir. 2011).
- 12 [Montana v. U. S.](#), 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981).
The tribal court lacks jurisdiction over fee land owned by non-Indians within the reservation. [Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.](#), 552 U.S. 1293, 128 S. Ct. 1761, 170 L. Ed. 2d 537 (2008).
- 13 [Nevada v. Hicks](#), 533 U.S. 353, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001); [Luger v. Luger](#), 2009 ND 84, 765 N.W.2d 523 (N.D. 2009).
- 14 [Gustafson v. Estate of Poitra](#), 2011 ND 150, 800 N.W.2d 842 (N.D. 2011).
- 15 [In re J.D.M.C.](#), 2007 SD 97, 739 N.W.2d 796 (S.D. 2007).
- 16 [Bradley v. Bear](#), 46 Kan. App. 2d 1008, 272 P.3d 611 (2012).
The tribal court has exclusive jurisdiction over tribal property disputes involving tribe members and events on the reservation. [Francis v. Dana-Cummings](#), 2008 ME 184, 962 A.2d 944 (Me. 2008).
- 17 [McGuire v. Aberle](#), 2013 SD 5, 826 N.W.2d 353 (S.D. 2013).
- 18 §§ 104 to 107.
- 19 § 98.
- 20 [Nevada v. Hicks](#), 533 U.S. 353, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001) (referencing 42 U.S.C.A. § 1983).

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IX. Civil and Criminal Courts and Proceedings in Indian Matters

A. Tribal Courts and Courts of Indian Offenses

2. Civil Jurisdiction of Tribal Courts and Courts of Indian Offenses

§ 123. Comity of tribal, state, and federal courts with concurrent jurisdiction

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West's Key Number Digest

West's Key Number Digest, [Indians](#)  220, 221

Principles of comity apply to favor the exercise of civil jurisdiction by tribal courts when concurrent jurisdiction exists with state courts¹ or federal courts.²

Comity may require the tribal and state courts to confer for the purposes of allocating jurisdiction between them.³

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Footnotes

- 1 [Granite Valley Hotel Ltd. Partnership v. Jackpot Junction Bingo and Casino](#), 559 N.W.2d 135 (Minn. Ct. App. 1997); [Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians](#), 2003 WI 118, 265 Wis. 2d 64, 665 N.W.2d 899 (2003).
As to state court abstention, see § 131.
- 2 [Kerr-McGee Corp. v. Farley](#), 115 F.3d 1498 (10th Cir. 1997); [Lemke ex rel. Teta v. Brooks](#), 614 N.W.2d 242 (Minn. Ct. App. 2000).
As to federal court abstention, see § 137.
- 3 [Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians](#), 2000 WI 79, 236 Wis. 2d 384, 612 N.W.2d 709 (2000).

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A. Tribal Courts and Courts of Indian Offenses


3. Criminal Jurisdiction of Tribal Courts and Courts of Indian Offenses

a. General Considerations

§ 124. Authority for criminal jurisdiction of Indian courts

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West's Key Number Digest

West's Key Number Digest, [Indians](#)  [220](#), [270](#), [274\(3\)](#)

Under the Indian Civil Rights Act an Indian tribe has inherent power to exercise criminal jurisdiction over "all Indians"¹ and particularly its members.² Criminal jurisdiction over Indians is divided among federal, state, and tribal governments; whether one or more of these sovereigns possess criminal jurisdiction in a particular instance depends upon the type of offense committed, where the offense was committed, and whether either the perpetrator or the victim is Indian.³

Criminal matters within the boundaries of an Indian reservation are generally within the exclusive jurisdiction of the tribal courts, subject to federal law,⁴ particularly the Indian Country Crimes Act, providing federal jurisdiction for certain offenses by or against Indians in Indian country,⁵ and the Indian Major Crimes Act, providing federal jurisdiction for enumerated offenses by Indians in Indian country.⁶

Reminder:

Protections are also afforded in the Indian court criminal proceedings by the Indian Civil Rights Act.⁷

Observation:

The Indian Country Crimes Act, providing federal jurisdiction for certain offenses by or against Indians in Indian country, does not extend to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively⁸ and does not extend to offenses committed by one Indian against the person or property of another Indian.⁹

Caution:

State, federal, and tribal criminal jurisdiction can be overlapping, and the existence of one is not necessarily determinative of the others.¹⁰ When that is the case, prosecution by the tribe does not bar prosecution for the same conduct by the State¹¹ or the federal government.¹²

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Footnotes

- 1 [25 U.S.C.A. § 1301\(2\).](#)
- 2 ["All Indians" means all of Indian ancestry who are also Indians by political affiliation, not all who are racially Indians. Means v. Navajo Nation, 432 F.3d 924 \(9th Cir. 2005\).](#)
- 3 [U.S. v. Shavanaux, 647 F.3d 993 \(10th Cir. 2011\).](#)
- 4 [State v. Beasley, 146 Idaho 594, 199 P.3d 771 \(Ct. App. 2008\).](#)
- 5 [As to regulations on criminal offenses under the Courts of Indian Offenses and Law and Order Code, see 25 C.F.R. §§ 11.400 et seq.](#)
- 6 [State v. Beasley, 146 Idaho 594, 199 P.3d 771 \(Ct. App. 2008\); State v. Owen, 2007 SD 21, 729 N.W.2d 356 \(S.D. 2007\).](#)
- 7 [§ 153.](#)
- 8 [§§ 155 to 163.](#)
- 9 [§ 125.](#)
- 10 [§ 153.](#)
- 11 [§ 126.](#)
- 12 [State v. Jim, 173 Wash. 2d 672, 273 P.3d 434 \(2012\).](#)

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3. Criminal Jurisdiction of Tribal Courts and Courts of Indian Offenses

a. General Considerations

§ 125. Indian Civil Rights Act protections afforded in Indian courts

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The Federal Indian Civil Rights Act (ICRA) affords protections to Indians in a manner similar to the United States Constitution's Bill of Rights¹ and is applicable in the context of tribal criminal laws and prosecutions, including, but not limited to:²

- protection against unreasonable search and seizures
- protection against double jeopardy
- protection against self-incrimination
- the right to a speedy and public trial
- the right to be informed of the nature and cause of the accusation
- the right to be confronted with the witnesses and have compulsory process
- the right, at the person's own expense, to have the assistance of counsel for defense (subject to exceptions)
- protection against excessive bail, excessive fines, or cruel and unusual punishments (subject to additional provisions on punishments prescribed)
- the right to a trial by jury of not less than six persons for any person accused of an offense punishable by imprisonment

The ICRA also makes specific provisions for punishments for particular categories of offenses³ and sentences.⁴

Practice Tip:

The ICRA provides for direct enforcement via a proceeding in habeas corpus to test the legality of a person's detention by order of an Indian tribe.⁵

The ICRA specifies the rights of criminal defendants in a criminal proceeding in which a tribe imposes a total term of imprisonment of more than one year, requiring that the tribe shall:⁶

- (1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution;
- (2) provide an indigent defendant the assistance of a defense attorney, at the expense of the tribal government;
- (3) require a qualified, licensed presiding judge;
- (4) prior to charging the defendant, make publicly available the tribal criminal laws and rules of evidence and procedure; and
- (5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

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Footnotes

- | | |
|---|------------------------|
| 1 | §§ 29 to 31. |
| 2 | 25 U.S.C.A. § 1302(a). |
| 3 | 25 U.S.C.A. § 1302(b). |
| 4 | 25 U.S.C.A. § 1302(d). |
| 5 | §§ 30, 31. |
| 6 | 25 U.S.C.A. § 1302(c). |

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b. Categories of Offenses Before Indian Courts

§ 126. Offenses by Indians against Indians in Indian country

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The Indian Civil Rights Act recognizes that an Indian tribe has inherent power to exercise criminal jurisdiction over "all Indians,"¹ and crimes committed by Indians against other Indians within Indian country are subject to the jurisdiction of tribal courts.² Tribal jurisdiction of crimes by Indians against Indians is, however, subject to federal exceptions, including:

- (1) The Indian Major Crimes Act, enumerating certain offenses and providing federal jurisdiction even though both the offender and victim are Indians under the same laws and penalties as any other person committing such offenses within the exclusive jurisdiction (federal enclave) of the United States;³
- (2) Violations of federal law dealing with intoxicants dispensed in Indian country;⁴
- (3) A state's assumption of jurisdiction by the consent of the tribe and the federal government;⁵ and
- (4) The federal government's ceding of criminal jurisdiction to the State.⁶

The Indian Country Crimes Act, extends to Indian country the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States (federal enclaves), except the District of Columbia,⁷ but expressly excepts offenses committed by one Indian against the person or property of another Indian.⁸

Footnotes

- 1 § 124.
- 2 As to regulations on criminal offenses under the Courts of Indian Offenses and Law and Order Code, see 25 C.F.R. §§ 11.400 et seq.
U. S. v. Antelope, 430 U.S. 641, 97 S. Ct. 1395, 51 L. Ed. 2d 701 (1977); People v. Morgan, 785 P.2d 1294 (Colo. 1990); Roe v. Doe, 2002 ND 136, 649 N.W.2d 566 (N.D. 2002).
- 3 §§ 155 to 163.
- 4 §§ 164 to 166.
- 5 § 145.
- 6 § 146.
- 7 § 153.
- 8 18 U.S.C.A. § 1152.

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b. Categories of Offenses Before Indian Courts

§ 127. Offenses by Indians who are not tribe members in Indian country

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West's Key Number Digest, [Indians](#)  [220](#), [270](#)

The Indian Civil Rights Act recognition that an Indian tribe has inherent power to exercise criminal jurisdiction over "all Indians,"¹ means that tribes may prosecute Indians who are not tribal members for misdemeanors committed on the tribe's reservation,² as a right inherent in the tribes' sovereignty.³ The provision does not deprive an enrolled member of another Indian tribe of equal protection or due process.⁴

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Footnotes

¹ § 126.

² As to regulations on criminal offenses under the Courts of Indian Offenses and Law and Order Code, see 25 C.F.R. §§ 11.400 et seq.
U.S. v. Lara, 541 U.S. 193, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (2004); U.S. v. Enas, 255 F.3d 662 (9th Cir. 2001); Young v. Neth, 263 Neb. 20, 637 N.W.2d 884 (2002).

³ U.S. v. Bird, 287 F.3d 709 (8th Cir. 2002).

⁴ Means v. Navajo Nation, 432 F.3d 924 (9th Cir. 2005).

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§ 128. Offenses by non-Indians in Indian country

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Tribal courts do not have criminal jurisdiction over non-Indians who commit crimes in Indian country,¹ as distinguished from Indians who are nonmembers of the tribe,² since criminal offenses occurring on a reservation and committed by non-Indians are subject to prosecution by state or federal governments, depending on the offense.³ Offenses committed by non-Indians against non-Indians within Indian country are subject to state jurisdiction⁴ while offenses committed by non-Indians against Indians within Indian country are subject to federal jurisdiction.⁵

Observation:

In the context of a roadblock on a public right-of-way within tribal territory established on tribal authority, tribal officers' inquiries going beyond Indian or non-Indian status, or including searches for evidence of crime, are not authorized on purely tribal authority in the case of non-Indians.⁶ Tribal officers do have the authority to detain non-Indian violators on Indian lands and transport them to the proper state or federal authorities for criminal prosecution for an offense committed on Indian lands.⁷

CUMULATIVE SUPPLEMENT

Cases:

Aside from certain crimes committed in Indian country by Indian defendants and a broader range of crimes by or against Indians in Indian country, as addressed by the federal Major Crimes Act (MCA), states are otherwise free to apply their criminal laws in cases of non-Indian victims and defendants, including within Indian country. [18 U.S.C.A. §§ 1152, 1153](#). [McGirt v. Oklahoma](#), 140 S. Ct. 2452, 207 L. Ed. 2d 985 (2020).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Oliphant v. Suquamish Indian Tribe](#), 435 U.S. 191, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978); [U.S. v. Terry](#), 400 F.3d 575 (8th Cir. 2005); [Los Coyotes Band of Cahuilla & Cupeno Indians v. Jewell](#), 729 F.3d 1025 (9th Cir. 2013); [State v. Kurtz](#), 350 Or. 65, 249 P.3d 1271 (2011); [State v. Madsen](#), 2009 SD 5, 760 N.W.2d 370 (S.D. 2009); [State v. Youde](#), 174 Wash. App. 873, 301 P.3d 479 (Div. 1 2013).
- 2 [§ 127](#).
- 3 [State v. Youde](#), 174 Wash. App. 873, 301 P.3d 479 (Div. 1 2013).
- 4 [§§ 141, 142](#).
- 5 [§§ 153, 154](#).
- 6 [Bressi v. Ford](#), 575 F.3d 891 (9th Cir. 2009).
- 7 [State v. Madsen](#), 2009 SD 5, 760 N.W.2d 370 (S.D. 2009).

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b. Categories of Offenses Before Indian Courts

§ 129. Offenses of domestic violence in Indian country

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By federal statute, the powers of Indian tribal self-government of a participating tribe include the power to exercise special domestic violence criminal jurisdiction over all persons, concurrent with the jurisdiction of the United States, a state, or both,¹ subject to exceptions when the victim and the defendant are both non-Indians, or when the defendant lacks ties to the Indian tribe.² Specific rights of defendants are stated for purposes of the statute's application, including the right to a jury trial if a term of imprisonment may be imposed and necessary rights under the United States Constitution.³

Definitions:

For this purpose, the statute defines the terms, including, but not limited to, dating violence, domestic violence, Indian country, and participating tribe.⁴

Footnotes

- 1 25 U.S.C.A. § 1304(b).
- 2 25 U.S.C.A. § 1304(b)(4).
- 3 25 U.S.C.A. § 1304(d).
- 4 25 U.S.C.A. § 1304(a).

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1. State Assumption of Jurisdiction in Indian Matters

§ 130. Federal restriction; federal and tribal consent

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West's Key Number Digest

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State courts have jurisdiction over a tribal member whose actions involve significant contacts with the state outside reservation boundaries.¹ State courts have limited jurisdiction over civil disputes involving Indians that arise on Indian reservations² as governed by federal law.³ State courts are also subject to tribal sovereign immunity from suit in state courts.⁴

A state assumes full civil jurisdiction over tribes that consent to it,⁵ as provided by federal statute,⁶ and by statute, the federal government cedes civil jurisdiction to certain states.⁷

When a state court action involves a member Indian in Indian country, the court has an independent obligation to determine whether jurisdiction exists even in the absence of a challenge from a party.⁸

State courts do not have jurisdiction to conduct even limited review of tribal court decisions.⁹

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Footnotes

- 1 [Inquiry Concerning Complaint of Judicial Standards Com'n v. Not Afraid](#), 2010 MT 285, 358 Mont. 532, 245 P.3d 1116 (2010).
The State has civil jurisdiction over conduct extending beyond the reservation. [State v. Maybee](#), 235 Or. App. 292, 232 P.3d 970 (2010).

- 2 Cayuga Nation v. Jacobs, 44 Misc. 3d 389, 986 N.Y.S.2d 791 (Sup 2014); Gustafson v. Estate of Poitra, 2011 ND 150, 800 N.W.2d 842 (N.D. 2011); Outsource Services Management, LLC v. Nooksack Business Corp., 181 Wash. 2d 272, 333 P.3d 380 (2014).
- 3 Hawkins v. Attatayuk, 322 P.3d 891 (Alaska 2014); State v. Manypenny, 682 N.W.2d 143 (Minn. 2004); Sheffer v. Buffalo Run Casino, PTE, Inc., 2013 OK 77, 315 P.3d 359 (Okla. 2013).
States have no jurisdiction over actions against Indians arising in Indian county absent federal authorization. Pueblo of Santa Ana v. Nash, 972 F. Supp. 2d 1254 (D.N.M. 2013), appeal dismissed, 10th Circ. (13-2182 & 13-2191) (Mar. 13, 2014).
- 4 § 11.
- 5 State v. Kostick, 755 S.E.2d 411 (N.C. Ct. App. 2014), review denied, 367 N.C. 508, 758 S.E.2d 872 (2014); Outsource Services Management, LLC v. Nooksack Business Corp., 181 Wash. 2d 272, 333 P.3d 380 (2014).
The tribe consented to state court jurisdiction by initiating an action in state court. Schaghticoke Indian Tribe v. Rost, 138 Conn. App. 204, 50 A.3d 411 (2012).
The State cannot expand its jurisdiction over civil causes arising on the Indian reservation without tribal consent. Knox v. State ex rel. Otter, 148 Idaho 324, 223 P.3d 266 (2009).
- 6 25 U.S.C.A. § 1322(a).
- 7 § 133.
- 8 In re Estate of Big Spring, 2011 MT 109, 360 Mont. 370, 255 P.3d 121 (2011).
- 9 In re M.M., 154 Cal. App. 4th 897, 65 Cal. Rptr. 3d 273 (1st Dist. 2007); Shakopee Mdewakanton Sioux (Dakota) Gaming Enterprise v. Prescott, 779 N.W.2d 320 (Minn. Ct. App. 2010).

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1. State Assumption of Jurisdiction in Indian Matters

§ 131. State court abstention for tribal courts; infringement of interests

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Under the "infringement test," a state court may determine whether to exercise jurisdiction over a matter involving a non-Indian and an Indian based on whether the state action infringes on the right of reservation Indians to make their own laws and be ruled by them, considering: (1) whether the parties are Indians or non-Indians; (2) whether the cause of action arose within the Indian reservation; and (3) the nature of the interest to be protected.¹ State courts may abstain and decline to exercise jurisdiction under this test.²

Practice Tip:

Some courts have compiled an extensive list for factors for the court's consideration on the question of abstention in relation to a tribal court.³

Footnotes

- 1 [In re Estate of Big Spring](#), 2011 MT 109, 360 Mont. 370, 255 P.3d 121 (2011); [South v. Lujan](#), 2014-NMCA-109, 336 P.3d 1000 (N.M. Ct. App. 2014); [Gustafson v. Estate of Poitra](#), 2011 ND 150, 800 N.W.2d 842 (N.D. 2011).
State court jurisdiction may not undermine tribal authority. [Luger v. Luger](#), 2009 ND 84, 765 N.W.2d 523 (N.D. 2009).
- 2 [Winer v. Penny Enterprises, Inc.](#), 2004 ND 21, 674 N.W.2d 9 (N.D. 2004).
- 3 [Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians](#), 2003 WI 118, 265 Wis. 2d 64, 665 N.W.2d 899 (2003) (Per concurring opinion of Shirley S. Abrahamson, C.J., for a majority of the court).

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§ 132. Tribal ordinances and customs effective after state assumption

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Any tribal ordinance or custom adopted by an Indian tribe, band, or community, and the exercise of any authority which it may possess, will, if not inconsistent with any applicable civil law of the state, be given full force and effect in the determination of civil causes of action following state assumption of civil jurisdiction over causes of action between Indians or to which Indians are parties.¹

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¹ [25 U.S.C.A. § 1322\(c\)](#).

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2. Federal Cession of State Jurisdiction in Indian Matters

§ 133. Federal cession of civil jurisdiction to specified states

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[Construction and Application of s4 of Federal Public Law 280, Codified at 28 U.S.C.A. s1360, Under Which Congress Expressly Granted Several States Limited Civil Jurisdiction Over Matters Involving Indians, 57 A.L.R. Fed. 2d 229](#)

Subject to specified limitations, the federal government has ceded jurisdiction in civil actions and proceedings between Indians or between Indians and any other person to the courts of certain states.¹ The primary provision ceding jurisdiction to various states,² represents an expression of federal policy governing the assumption by states of civil jurisdiction over the Indian Nations.³ Under this provision, the civil laws of the state that are of general application to private persons or private property have the same force and effect within the Indian country as they have elsewhere in the state.⁴ The statute allows states whose constitution or statutes contain organic law disclaimers of jurisdiction over Indian country to assume jurisdiction but does not require the states amend their constitutions in order to make an effective acceptance of jurisdiction.⁵

Since the enumerated states are mandated to exercise civil jurisdiction over the Indian country within their borders,⁶ jurisdiction is automatically conferred and no formal acceptance by the states is required.⁷

Observation:

Under a cession of jurisdiction, the resulting jurisdiction between the state and tribal courts may be concurrent but is not longer exclusively vested in the tribal courts and may require a balancing of equities to determine the proper placement of a particular case.⁸

Practice Tip:

A pending federal action does not abate by a statutory cession of federal civil jurisdiction to a state as the cession takes effect on the date after the final determination of the action for that purpose.⁹

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Footnotes

- 1 25 U.S.C.A. §§ 233, 766(b), 1300b-15, 1300f(c), 1725; 28 U.S.C.A. § 1360.
- 2 28 U.S.C.A. § 1360.
- 3 *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 106 S. Ct. 2305, 90 L. Ed. 2d 881 (1986).
- 4 28 U.S.C.A. § 1360(a).
- 5 *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 99 S. Ct. 740, 58 L. Ed. 2d 740 (1979).
- 6 *Fort Mojave Tribe v. San Bernardino County*, 543 F.2d 1253 (9th Cir. 1976).
- 7 *Omaha Tribe of Neb. v. Village of Walthill*, 334 F. Supp. 823 (D. Neb. 1971), judgment *aff'd*, 460 F.2d 1327 (8th Cir. 1972).
- 8 *Parry v. Haendiges*, 458 F. Supp. 2d 90 (W.D. N.Y. 2006).
- 9 25 U.S.C.A. § 1325(a).

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2. Federal Cession of State Jurisdiction in Indian Matters

§ 134. Exemptions from federal cession of state jurisdiction

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[Construction and Application of s4 of Federal Public Law 280, Codified at 28 U.S.C.A. s1360, Under Which Congress Expressly Granted Several States Limited Civil Jurisdiction Over Matters Involving Indians, 57 A.L.R. Fed. 2d 229](#)

The primary federal cession of civil jurisdiction to specified states¹ does not include jurisdiction over the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, held in trust by the United States or subject to a restriction against alienation imposed by the United States, nor jurisdiction to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.² It also does not include jurisdiction over fishing rights.³

The grant does not confer jurisdiction on the states over the tribes themselves.⁴

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Footnotes

¹ [§ 133.](#)

- 2 28 U.S.C.A. § 1360(b).
3 White Mountain Apache Tribe v. State of Ariz., Dept. of Game and Fish, 649 F.2d 1274 (9th Cir. 1981).
4 Seminole Tribe of Florida v. Butterworth, 658 F.2d 310 (5th Cir. 1981); Long v. Chemehuevi Indian
Reservation, 115 Cal. App. 3d 853, 171 Cal. Rptr. 733 (4th Dist. 1981).

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§ 135. Retrocession of jurisdiction

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The United States is authorized to accept a retrocession by any state of all or any measure of the civil jurisdiction acquired by the State.¹ Acceptance by the Secretary of the Interior of a retrocession proclaimed by the governor of the state is effective regardless of whether the governor's proclamation is valid under state law.²

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- ¹ 25 U.S.C.A. §§ 1300b-15, 1323(a).
The United States is free to accept all or any part of the jurisdiction ceded to it by a state. [Omaha Tribe of Neb. v. Village of Walthill, Neb.](#), 460 F.2d 1327 (8th Cir. 1972).
- ² [Oliphant v. Schlie](#), 544 F.2d 1007 (9th Cir. 1976), judgment rev'd on other grounds, 435 U.S. 191, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978).

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41 Am. Jur. 2d Indians; Native Americans § 136

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Indians; Native Americans

Lonnie E. Griffith, Jr., J.D.

IX. Civil and Criminal Courts and Proceedings in Indian Matters

C. Federal Civil Jurisdiction in Indian Matters

§ 136. Basis of federal jurisdiction in Indian matters

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Treatises and Practice Aids

[Wright and Miller's Federal Practice and Procedure, Jurisdiction and Related Matters § 3579](#)

Subject to tribal sovereign immunity from suit,¹ federal district court jurisdiction in Indian matters arises under the generally applicable statutes governing federal question jurisdiction² and federal diversity jurisdiction.³ The federal district courts also have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.⁴

Observation:

For all practical purposes, jurisdiction under the latter statute is identical to federal question jurisdiction,⁵ but it is intended to open the federal courts to the kind of claims that could have been brought by the United States as trustee but were not brought⁶ as when a tribe sues to protect federally derived property rights and the United States has declined to sue on behalf of the Indians.⁷

Another provision grants jurisdiction to the district courts of any civil action involving the right of any person, wholly or partly of Indian blood or descent, to any allotment of land under an Act of Congress or treaty⁸ and is a limited consent by the United States to be sued in the context of land allotments.⁹

The Indian Civil Rights Act provides that habeas corpus relief is available in federal court to test the legality of a person's detention by order of an Indian tribe.¹⁰

The Indian Tucker Act confers jurisdiction on the court of federal claims for cases against the United States in favor of an Indian tribe if the claim arises under federal law or is otherwise cognizable in that court.¹¹

A district court does not have jurisdiction over a tribe or a tribal court¹² or matters involving intratribal controversies based on rights secured by tribal law.¹³

For federal jurisdictional purposes, an Indian nation is not a foreign state, or a state of the union,¹⁴ and a tribe is not a citizen of a state different from the state in which it is located¹⁵ nor is it a citizen of any state.¹⁶ For diversity purposes, the enrolled member of a tribe residing within the boundaries of a reservation is a citizen of the state in which the reservation lies.¹⁷

Reminder:

A federal statutory definition of "Indian country"¹⁸ applies in determining the applicability of federal civil jurisdiction.¹⁹

A pending federal action does not abate by a statutory cession of federal civil jurisdiction to a state.²⁰

CUMULATIVE SUPPLEMENT

Cases:

Court of Appeals had subject matter jurisdiction over Indian tribe's declaratory judgment action seeking determination that state court lacked jurisdiction over personal injury action brought by visitors to on-reservation gaming facility on the alleged basis that IGRA did not permit shifting of jurisdiction to state court, where tribe sought declaratory relief under federal law against state regulation, namely, the state-court proceeding, claiming that federal law preempted it. Indian Gaming Regulatory Act § 11, 25 U.S.C.A. § 2710(d)(1); 28 U.S.C.A. § 1331. *Navajo Nation v. Dalley*, 896 F.3d 1196 (10th Cir. 2018).

Federal district court had original jurisdiction over Gila River Indian Community's (GRIC) claims against upstream landowners for pumping Gila River subflow in derogation of its water rights; tribe's water rights, which were held in trust by United States, were impliedly reserved when Congress established Gila River Reservation, and United States could have brought case in its capacity as trustee. 28 U.S.C.A. § 1362. *Gila River Indian Community v. Cranford*, 459 F. Supp. 3d 1246 (D. Ariz. 2020).

Indian tribes' alleged injury to their rights to their tribal land was certainly impending and fairly traceable to President's issuance of presidential permit to energy company for cross-border oil pipeline, as required to have standing to pursue claims challenging the permit as violative of Indian treaties, the Foreign Commerce Clause of the Constitution, tribes' sovereign powers, and various federal statutes and regulations, where tribes alleged that their injuries stemmed from pipeline pre-construction activities, including preparation of man camps and road projects, which had already begun. U.S. Const. art. 1, § 8, cl. 3. *Rosebud Sioux Tribe v. Trump*, 428 F. Supp. 3d 282 (D. Mont. 2019).

Indian tribe's predicate cause of action for declaratory relief against city, seeking judicial confirmation of the tribe's title to real property alleging tribe was the owner of the property under land grant preserved by Treaty of Guadalupe Hidalgo, was state-law claim to quiet title, and thus cause of action did not arise under federal law for purposes of federal question jurisdiction; tribe's cause of action was not provided by Treaty or created by other federal law, and tribe's claim did not necessarily depend on the resolution of a substantial question of federal law merely because it referred to the Treaty. 28 U.S.C.A. §§ 1331, 2201. *Ysleta Del Sur Pueblo v. City of El Paso*, 433 F. Supp. 3d 1020 (W.D. Tex. 2020).

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Footnotes

- 1 § 11.
- 2 28 U.S.C.A. § 1331.
The fact that an Indian tribe or individual Indian is involved in a case does not afford federal question jurisdiction. *Miccosukee Tribe of Indians of Florida v. Kraus-Anderson Const. Co.*, 607 F.3d 1268 (11th Cir. 2010).
- 3 28 U.S.C.A. § 1332.
- 4 28 U.S.C.A. § 1362.
The statute grants jurisdiction in civil actions so long as no other jurisdictional bar exists and does not waive the United States' sovereign immunity. *Paiute-Shoshone Indians of Bishop Community of Bishop Colony, Cal. v. City of Los Angeles*, 637 F.3d 993, 79 Fed. R. Serv. 3d 55 (9th Cir. 2011).
- 5 *Oglala Sioux Tribe v. C & W Enterprises, Inc.*, 487 F.3d 1129 (8th Cir. 2007).
- 6 *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 96 S. Ct. 1634, 48 L. Ed. 2d 96 (1976).
- 7 *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 103 S. Ct. 3201, 77 L. Ed. 2d 837 (1983).
- 8 28 U.S.C.A. § 1353; and 25 U.S.C.A. § 345.
- 9 *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 19 Fed. R. Serv. 3d 1 (9th Cir. 1991).
- 10 §§ 30, 31.
- 11 28 U.S.C.A. § 1505.
- 12 *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167 (5th Cir. 2014), cert. granted, 2015 WL 2473345 (U.S. 2015).
- 13 *County of Charles Mix v. U.S. Dept. of Interior*, 674 F.3d 898 (8th Cir. 2012); *Alto v. Black*, 738 F.3d 1111, 87 Fed. R. Serv. 3d 445 (9th Cir. 2013).
- 14 § 10.

- 15 [Oneida Indian Nation of New York State v. Oneida County, N. Y.](#), 464 F.2d 916 (2d Cir. 1972), judgment
rev'd on other grounds, 414 U.S. 661, 94 S. Ct. 772, 39 L. Ed. 2d 73 (1974).
- 16 [Auto-Owners Ins. Co. v. Tribal Court of Spirit Lake Indian Reservation](#), 495 F.3d 1017, 223 Ed. Law Rep.
133 (8th Cir. 2007).
- 17 [Larson v. Martin](#), 386 F. Supp. 2d 1083 (D.N.D. 2005).
- 18 § 151.
- 19 [Hydro Resources, Inc. v. U.S. E.P.A.](#), 608 F.3d 1131 (10th Cir. 2010).
- 20 § 130.

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IX. Civil and Criminal Courts and Proceedings in Indian Matters

C. Federal Civil Jurisdiction in Indian Matters

§ 137. Abstention for exhaustion of tribal remedies

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Indians](#)  240, 244

The "tribal exhaustion rule" requires that federal courts abstain from hearing certain claims relating to Indian tribes until the plaintiff has first exhausted those claims in tribal court.¹ The absence of any ongoing litigation over the same matter in tribal courts does not defeat the tribal exhaustion requirement.²

The tribal exhaustion doctrine is prudential rather than jurisdictional³ but is mandatory when a case fits within the policy.⁴ Civil disputes arising out of the activities of non-Indians on reservation lands almost always require exhaustion of tribal remedies if they involve the tribe.⁵

If it is plain that tribal jurisdiction does not exist, or that its assertion is frivolous or obviously invalid under clearly established law, the exhaustion requirement should be waived.⁶ The exceptions to exhaustion of tribal court remedies are when: (1) an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith; (2) the action patently violates express jurisdictional prohibitions; (3) exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction; or (4) it is plain that no federal grant provides for tribal governance of nonmembers' conduct on reservation land alienated to non-Indians.⁷

CUMULATIVE SUPPLEMENT

Cases:

Oil and gas companies properly exhausted their tribal court remedies before filing suit in federal court by moving to dismiss underlying trial court case for lack of jurisdiction and appealing the issue to tribal appellate court, without development of a

factual record; companies raised a facial challenge to tribal court jurisdiction, and development of a factual record was generally not required for facial challenges to jurisdiction, since requiring factual development when the jurisdictional challenge did not turn on issues of fact would not serve the orderly administration of justice and would serve no purpose other than delay. [Kodiak Oil & Gas \(USA\) Inc. v. Burr](#), 932 F.3d 1125 (8th Cir. 2019).

Tribal exhaustion was not required for claims against nonmember police officers alleging false imprisonment, false arrest, assault and battery, wrongful death, spoliation of evidence, and conspiracy that arose from their killing of tribe member on tribe's land, since officers' actions did not threaten tribe as whole; although torts claims arose on tribal land, they did not rise above generalized threat or implicate tribe's core sovereign interest in excluding non-Indians from tribal lands or any other tribal interests at stake under *Montana v. United States* exception to principle that tribe generally lacked authority to regulate nonmember conduct. [Norton v. Ute Indian Tribe of the Uintah and Ouray Reservation](#), 862 F.3d 1236 (10th Cir. 2017).

Persons whose lineal ancestors were Creek Nation Freedmen and citizens of Muscogee Creek Nation (MCN) failed to establish that it would be futile to require them to exhaust their tribal remedies before bringing action seeking declaratory and injunctive relief to secure rights and privileges of MCN citizenship, even though tribal court had upheld tribe's repeated denial of citizenship applications of two other Freedmen descendants, where tribal code contained explicit, written procedure for applying for citizenship and appealing adverse determinations through tribal courts, other Freedmen were not parties in case, it was not clear how similarly situated they were to plaintiffs, and tribal courts never considered their substantive claims in prior action. [Muscogee Creek Indian Freedmen Band, Inc. v. Bernhardt](#), 385 F. Supp. 3d 16 (D.D.C. 2019).

Stay pending exhaustion of tribal court remedies was warranted, in action by petroleum fuel supplier against federally chartered tribal corporation seeking to compel arbitration of contract dispute concerning unpaid federal excise taxes allegedly owed to supplier pursuant to fuel supply agreement with respect to fuel sales on tribal land, since erroneous dismissal could permanently bar supplier from asserting his claims in federal court. [World Fuel Services, Inc. v. Nambe Pueblo Development Corporation](#), 362 F. Supp. 3d 1021 (D.N.M. 2019).

Exhaustion in tribal courts was not required in action brought by borrower against high-interest payday lender, alleging violation of the Fair Debt Collection Practices Act (FDCPA), the Fair Credit Extension Uniformity Act, and state usury laws; the dispute did not arise from the actions of nonmember on tribal land and did not otherwise raise issues of tribal integrity, sovereignty, self-government, or allocation of resources. Consumer Credit Protection Act, § 802 et seq., 15 U.S.C.A. § 1692 et seq. [Smith v. Western Sky Financial, LLC](#), 168 F. Supp. 3d 778 (E.D. Pa. 2016).

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Footnotes

- 1 [DISH Network Service L.L.C. v. Laducer](#), 725 F.3d 877 (8th Cir. 2013); [Evans v. Shoshone-Bannock Land Use Policy Com'n](#), 736 F.3d 1298 (9th Cir. 2013), for additional opinion, see, 549 Fed. Appx. 625 (9th Cir. 2013); [Thlopthlocco Tribal Town v. Stidham](#), 762 F.3d 1226 (10th Cir. 2014).
- 2 [Sharber v. Spirit Mountain Gaming Inc.](#), 343 F.3d 974 (9th Cir. 2003).
- 3 [DISH Network Service L.L.C. v. Laducer](#), 725 F.3d 877 (8th Cir. 2013); [Evans v. Shoshone-Bannock Land Use Policy Com'n](#), 736 F.3d 1298 (9th Cir. 2013), for additional opinion, see, 549 Fed. Appx. 625 (9th Cir. 2013).
- 4 [Gaming World Intern., Ltd. v. White Earth Band of Chippewa Indians](#), 317 F.3d 840, 186 A.L.R. Fed. 581 (8th Cir. 2003).
- 5 [Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority](#), 207 F.3d 21 (1st Cir. 2000).
- 6 [DISH Network Service L.L.C. v. Laducer](#), 725 F.3d 877 (8th Cir. 2013).

7 [Grand Canyon Skywalk Development, LLC v. 'Sa' Nyu Wa Inc.](#), 715 F.3d 1196 (9th Cir. 2013), cert. denied, 134 S. Ct. 825, 187 L. Ed. 2d 686 (2013).

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C. Federal Civil Jurisdiction in Indian Matters

§ 138. Recognized tribe as plaintiff essential to jurisdiction

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Indians](#)  240

Under the statutory authority for federal district court actions by Indian tribes or bands with a governing body that has been duly recognized by the Secretary of the Interior,¹ tribal recognition is an expressed prerequisite to jurisdiction,² and the grant of jurisdiction is not applicable to suits brought by individual Indians,³ semiautonomous tribal entities,⁴ or the United States.⁵

Reminder:

That the tribe is the nominal plaintiff is not alone sufficient to meet the other prerequisites for jurisdiction under the statute.⁶

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Footnotes

¹ [§ 136.](#)

² [Price v. State of Hawaii, 764 F.2d 623 \(9th Cir. 1985\).](#)

As to tribal recognition, generally, see [§ 7.](#)

- 3 Wardle v. Northwest Inv. Co., 830 F.2d 118 (8th Cir. 1987); Dillon v. State of Mont., 634 F.2d 463 (9th
Cir. 1980).
- 4 Navajo Tribal Utility Authority v. Arizona Dept. of Revenue, 608 F.2d 1228 (9th Cir. 1979).
- 5 U.S. v. State Tax Commission of State of Miss., 505 F.2d 633 (5th Cir. 1974).
- 6 Oglala Sioux Tribe v. Schwarting, 894 F. Supp. 2d 1195 (D. Neb. 2012).

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C. Federal Civil Jurisdiction in Indian Matters

§ 139. Necessary and indispensable parties

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West's Key Number Digest

West's Key Number Digest, [Indians](#)  240, 246

The United States is not necessarily an indispensable party to a case involving a dispute over Indian lands,¹ as when the action is brought by an Indian fee owner of allotted lands held in trust by the United States,² but the United States is an indispensable party to any action determining a dispute over allotted land to which it holds legal title until the patent is issued, by virtue of its trust relationship to the land,³ and is a necessary party to any action in which the relief sought might interfere with its obligation to protect Indian lands against alienation.⁴

When an Indian tribe is an indispensable party to the action, the court's jurisdiction is defeated if joinder of the tribe is not feasible without its consent under tribal sovereign immunity.⁵ Thus, an action challenging the tribe's membership policies, in which the tribe must be joined but does not consent to be joined, cannot be maintained.⁶

An Indian tribe is an indispensable party when the tribe claims jurisdiction over a parcel of land, and its interest would be impaired if the plaintiffs were declared to be the beneficial owners of the land.⁷

In an action challenging a tax compact between the State and a federally recognized Indian tribe, the State had significant interests that would be affected if the relief requested by a tribally licensed retailer were granted, thus rendering the State a necessary party for mandatory joinder.⁸

CUMULATIVE SUPPLEMENT

Cases:

In analyzing whether plaintiff will have remedy if action is dismissed for nonjoinder of Indian tribe, in determining whether Indian tribe is an indispensable party, court gives deference to tribes, as a party's lack of remedy does not prevail over a tribe's right to protect its sovereign interests; court cannot ignore fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent. [NMRA 1-019](#). [Mendoza v. Isleta Resort and Casino, 2020-NMSC-006, 460 P.3d 467 \(N.M. 2020\)](#).

Indian tribe was not a necessary party to businessman's action against tribal officials in their official and individual capacities, alleging tortious and unauthorized conduct relating to officials' demand that businessman obtain a permit in order to do business with oil and gas companies operating on tribal land; businessman could obtain complete relief without adding tribe as a party, tribal officials could adequately represent tribe's interests, and there was no threat of conflicting obligations. [Utah R. Civ. P. 19](#). [Harvey v. Ute Indian Tribe of Uintah and Ouray Reservation, 2017 UT 75, 416 P.3d 401 \(Utah 2017\)](#).

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Footnotes

- 1 [Spirit Lake Tribe v. North Dakota, 262 F.3d 732 \(8th Cir. 2001\)](#).
- 2 [Olinger v. City of Palm Springs, 425 F. Supp. 174 \(C.D. Cal. 1977\)](#).
- 3 [Begay v. Albers, 721 F.2d 1274 \(10th Cir. 1983\)](#).
- 4 [Carlson v. Tulalip Tribes of Washington, 510 F.2d 1337, 19 Fed. R. Serv. 2d 968 \(9th Cir. 1975\)](#).
- 5 [Fluent v. Salamanca Indian Lease Authority, 928 F.2d 542 \(2d Cir. 1991\)](#); [Shermoen v. U.S., 982 F.2d 1312, 24 Fed. R. Serv. 3d 737 \(9th Cir. 1992\)](#); [St. Pierre v. Norton, 498 F. Supp. 2d 214, 68 Fed. R. Serv. 3d 287 \(D.D.C. 2007\)](#).
- 6 [St. Pierre v. Norton, 498 F. Supp. 2d 214, 68 Fed. R. Serv. 3d 287 \(D.D.C. 2007\)](#).
- 7 [Rosales v. U.S., 73 Fed. Appx. 913 \(9th Cir. 2003\)](#).
- 8 [Tonasket v. Sargent, 830 F. Supp. 2d 1078 \(E.D. Wash. 2011\)](#), [aff'd](#), [510 Fed. Appx. 648 \(9th Cir. 2013\)](#), [cert. denied](#), [134 S. Ct. 129, 187 L. Ed. 2d 38 \(2013\)](#).

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§ 140. Declaratory and injunctive relief

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Indians](#)  240

An Indian tribe's sovereign immunity does not preclude declaratory relief against tribal council members¹ nor does tribal immunity bar suits for prospective injunctive relief against Indian tribal officers.²

District courts have jurisdiction to grant declaratory and injunctive relief to Indians demanding that the Bureau of Indian Affairs (BIA) recognize a certain tribal government under the arbitrary and capricious standard of the Administrative Procedure Act.³ However, a district court is without jurisdiction in an action by a tribe's election board seeking a declaratory judgment that the BIA unlawfully interfered with tribal elections since the action necessarily requires an interpretation of the tribe's constitution.⁴

CUMULATIVE SUPPLEMENT

Cases:

Balance of harms weighed in favor of issuance of preliminary injunction preventing tribal court officials from proceeding in underlying tribal court action against oil and gas companies; without the injunction, the oil and gas companies would be forced to expend the time and cost associated with continuing litigation in a tribal court that lacked jurisdiction over them, whereas the only possible injury to the tribal court officials from the injunction was delay. [Kodiak Oil & Gas \(USA\) Inc. v. Burr](#), 932 F.3d 1125 (8th Cir. 2019).

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Footnotes

- 1 Comstock Oil & Gas Inc. v. Alabama and Coushatta Indian Tribes of Texas, 261 F.3d 567 (5th Cir. 2001); Winnemucca Indian Colony v. U.S. ex rel. Dept. of the Interior, 837 F. Supp. 2d 1184 (D. Nev. 2011).
- 2 Michigan v. Bay Mills Indian Community, 134 S. Ct. 2024, 188 L. Ed. 2d 1071 (2014); Vann v. Kempthorne, 534 F.3d 741 (D.C. Cir. 2008).
- 3 Winnemucca Indian Colony v. U.S. ex rel. Dept. of the Interior, 837 F. Supp. 2d 1184 (D. Nev. 2011).
- 4 Sac & Fox Tribe of Mississippi in Iowa Election Board v. Bureau of Indian Affairs, 321 F. Supp. 2d 1055 (N.D. Iowa 2004).

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D. State Criminal Jurisdiction in Indian Matters

1. General Considerations

§ 141. Crimes by and against non-Indian in reservation or Indian country

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West's Key Number Digest

West's Key Number Digest, [Indians](#)  266, 278

State jurisdiction over criminal matters generally applies to all crimes committed on the Indian reservation by persons not members of the tribe against other nonmembers of the tribe,¹ as well as victimless crimes by non-Indians on a reservation,² such as drug offenses,³ traffic offenses,⁴ or impaired driving offenses.⁵ States also have jurisdiction over crimes by members of unrecognized tribes on the reservation⁶ or in Indian country.⁷ The State's jurisdiction is based on the fact that the crimes do not involve essential tribal relations or affect the rights of Indians.⁸

CUMULATIVE SUPPLEMENT

Cases:

Tribal governments generally lack criminal jurisdiction over non-Indians who commit crimes in Indian country. [U.S. v. Bryant](#), 136 S. Ct. 1954 (2016).

There is generally no requirement of implementing legislation to trigger state court criminal jurisdiction over crimes committed at any particular geographic location within the State of Iowa, including tribal settlements. [State v. Stanton](#), 933 N.W.2d 244 (Iowa 2019).

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Footnotes

- 1 People of State of N.Y. ex rel. Ray v. Martin, 326 U.S. 496, 66 S. Ct. 307, 90 L. Ed. 261 (1946); U.S. v. Langford, 641 F.3d 1195 (10th Cir. 2011); People v. Collins, 298 Mich. App. 166, 826 N.W.2d 175 (2012); State v. Harrison, 2010-NMSC-038, 148 N.M. 500, 238 P.3d 869 (2010); State v. Kurtz, 350 Or. 65, 249 P.3d 1271 (2011); State v. Madsen, 2009 SD 5, 760 N.W.2d 370 (S.D. 2009).
- 2 State v. Harrison, 2010-NMSC-038, 148 N.M. 500, 238 P.3d 869 (2010); State v. Kurtz, 350 Or. 65, 249 P.3d 1271 (2011); State v. Reber, 2007 UT 36, 171 P.3d 406 (Utah 2007).
- 3 People v. Collins, 298 Mich. App. 166, 826 N.W.2d 175 (2012).
- 4 State v. Harrison, 2010-NMSC-038, 148 N.M. 500, 238 P.3d 869 (2010).
- 5 State v. Sanchez, 2014-NMCA-095, 335 P.3d 253 (N.M. Ct. App. 2014); State v. Kostick, 755 S.E.2d 411 (N.C. Ct. App. 2014), review denied, 367 N.C. 508, 758 S.E.2d 872 (2014).
- 6 State v. Velky, 263 Conn. 602, 821 A.2d 752 (2003).
- 7 State v. Reber, 2007 UT 36, 171 P.3d 406 (Utah 2007).
- 8 State v. Sorkhabi, 202 Ariz. 450, 46 P.3d 1071 (Ct. App. Div. 1 2002).

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D. State Criminal Jurisdiction in Indian Matters

1. General Considerations

§ 142. Crimes by or against Indians in reservation or Indian country

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West's Key Number Digest

West's Key Number Digest, [Indians](#)  264, 270, 274(2)

Subject to the State's assumption of jurisdiction with the consent of the tribe under federal law,¹ or the federal government cession of criminal jurisdiction to the State, which does not require tribal consent,² a state does not have jurisdiction over crimes committed in Indian country³ or within a reservation⁴ by an Indian⁵ or where the victim is an Indian.⁶ When jurisdiction is ceded to the State by the federal government for Indian offenses committed in Indian country, the State has jurisdiction if either the defendant or the victim is an Indian.⁷

Offenses committed by Indians within the reservation borders but on fee or allotment land fall within the State's jurisdiction.⁸ The State's jurisdiction may also encompass the offenses of a tribe member within the reservation boundaries but on land owned by the railroad⁹ or on state highway land.¹⁰

The State may have jurisdiction over an offense committed by an Indian off the reservation of the particular band of the Indian's tribe but on the reservation of another band of the tribe when tribal governance lies with the band rather than the tribe.¹¹

CUMULATIVE SUPPLEMENT

Cases:

State courts generally have no jurisdiction to try Indians for conduct committed in Indian country. [18 U.S.C.A. § 1153\(a\)](#). [McGirt v. Oklahoma](#), 140 S. Ct. 2452 (2020).

Aside from certain crimes committed in Indian country by Indian defendants and a broader range of crimes by or against Indians in Indian country, as addressed by the federal Major Crimes Act (MCA), states are otherwise free to apply their criminal laws in cases of non-Indian victims and defendants, including within Indian country. 18 U.S.C.A. §§ 1152, 1153. *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

Most States lack jurisdiction over crimes committed in Indian country against Indian victims. *U.S. v. Bryant*, 136 S. Ct. 1954 (2016).

[END OF SUPPLEMENT]

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Footnotes

- 1 § 145.
- 2 § 146.
- 3 *State v. Vandever*, 2013-NMCA-002, 292 P.3d 476 (N.M. Ct. App. 2012).
- 4 *Knox v. State ex rel. Otter*, 148 Idaho 324, 223 P.3d 266 (2009); *State v. Pink*, 144 Wash. App. 945, 185 P.3d 634 (Div. 2 2008).
- 5 *Knox v. State ex rel. Otter*, 148 Idaho 324, 223 P.3d 266 (2009); *State v. Quintana*, 2008-NMSC-012, 143 N.M. 535, 178 P.3d 820 (2008) (holding modified on other grounds by, *State v. Steven B.*, 2015 WL 3904989 (N.M. 2015)); *State v. Pink*, 144 Wash. App. 945, 185 P.3d 634 (Div. 2 2008).
- 6 *State v. Eagle Speaker*, 2000 MT 152, 300 Mont. 115, 4 P.3d 1 (2000).
- 7 *State v. Wabashaw*, 274 Neb. 394, 740 N.W.2d 583, 55 A.L.R. Fed. 2d 631 (2007).
- 8 *State v. Shale*, 182 Wash. 2d 882, 345 P.3d 776 (2015).
- 9 *State v. Clark*, 167 Wash. App. 667, 274 P.3d 1058 (Div. 3 2012), *aff'd*, 178 Wash. 2d 19, 308 P.3d 590 (2013).
- 10 *State v. Yallup*, 160 Wash. App. 500, 248 P.3d 1095 (Div. 3 2011).
The highway easement exception applies only to traffic offenses. *State v. Pink*, 144 Wash. App. 945, 185 P.3d 634 (Div. 2 2008).
- 11 *State v. Davis*, 773 N.W.2d 66 (Minn. 2009).

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D. State Criminal Jurisdiction in Indian Matters

1. General Considerations

§ 143. Crimes committed by Indians off reservation

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West's Key Number Digest

West's Key Number Digest, [Indians](#)  265, 275(2)

The federal statutory scheme, which neither prescribes nor suggests that state officers cannot enter a reservation to investigate or prosecute off-reservation violations, has not stripped the states of their inherent jurisdiction on reservations with respect to off-reservation crimes.¹ Thus, subject to federal limitations on state jurisdiction inside Indian country,² a state has general criminal jurisdiction over reservation Indians for crimes committed off the reservation.³ Even within Indian country, but outside the tribe's reservation, state criminal jurisdiction may apply when the State has lawfully assumed jurisdiction pursuant to federal authority,⁴ or the State has been ceded criminal jurisdiction by federal law.⁵

The State's criminal jurisdiction for off-reservation offenses encompasses Indian off-reservation activities that would be regulated by treaty if the activities occurred on the reservation.⁶

The defendant's affiliation with a federally recognized Indian tribe, or lack of that affiliation, has no bearing on the State's criminal jurisdiction over crimes committed off the tribe's reservation and within the state boundaries and a state incorporated city.⁷

The authority of state, county, and local law enforcement officers to investigate off-reservation crimes in Indian country is subject to a federal law supremacy analysis for the infringement of tribal sovereignty but may be permissible.⁸ A nontribal law enforcement officer may stop and arrest a tribe member on the reservation for an offense committed by the tribe member off the reservation.⁹

Footnotes

- 1 Nevada v. Hicks, 533 U.S. 353, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001).
- 2 §§ 151, 152.
- 3 Nevada v. Hicks, 533 U.S. 353, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001); DeCoteau v. District County Court for Tenth Judicial Dist., 420 U.S. 425, 95 S. Ct. 1082, 43 L. Ed. 2d 300 (1975); State v. Davis, 773 N.W.2d 66 (Minn. 2009); State v. LeMay, 2011 MT 323, 363 Mont. 172, 266 P.3d 1278 (2011); State v. Harrison, 2010-NMSC-038, 148 N.M. 500, 238 P.3d 869 (2010); Yellowbear v. State, 2008 WY 4, 174 P.3d 1270 (Wyo. 2008).
- 4 State v. Comenout, 173 Wash. 2d 235, 267 P.3d 355 (2011).
- 5 State v. Wabashaw, 274 Neb. 394, 740 N.W.2d 583, 55 A.L.R. Fed. 2d 631 (2007).
- 6 State v. Delorme, 2013 ND 123, 834 N.W.2d 300 (N.D. 2013).
- 7 State v. LeMay, 2011 MT 323, 363 Mont. 172, 266 P.3d 1278 (2011).
- 8 State v. Harrison, 2010-NMSC-038, 148 N.M. 500, 238 P.3d 869 (2010).
- 9 State v. Harrison, 2010-NMSC-038, 148 N.M. 500, 238 P.3d 869 (2010); State v. Smith, 246 Or. App. 614, 268 P.3d 644 (2011).

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D. State Criminal Jurisdiction in Indian Matters

1. General Considerations

§ 144. Crimes subject to prior prosecution in tribal court; double jeopardy

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West's Key Number Digest

West's Key Number Digest, [Double Jeopardy](#)  183.1

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[Validity of State Prosecution Subsequent to Tribal Court Prosecution](#), 116 A.L.R.5th 313

The United States Constitution's Fifth Amendment bar against double jeopardy does not bar a state prosecution for the same acts prosecuted in Indian tribal court, under the dual sovereignty or separate sovereign rule,¹ as predicated on the principle applied in federal court prosecutions,² although in some states the subsequent prosecution may be barred by state statute.³ Under another interpretation, a state's double jeopardy statute is inapplicable because the Indian tribe is not considered another state or country within the meaning of the statute.⁴

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Footnotes

¹ [Booth v. State](#), 903 P.2d 1079 (Alaska Ct. App. 1995); [State v. Mitchell](#), 1998 ME 128, 712 A.2d 1033 (Me. 1998).

² [§ 158](#).

- 3 Booth v. State, 903 P.2d 1079 (Alaska Ct. App. 1995); People v. Morgan, 785 P.2d 1294 (Colo. 1990); Hill v. Eppolito, 196 Misc. 2d 616, 766 N.Y.S.2d 509, 116 A.L.R.5th 703 (Sup 2003), *aff'd*, 5 A.D.3d 854, 772 N.Y.S.2d 634 (3d Dep't 2004).
- 4 State v. Moses, 145 Wash. 2d 370, 37 P.3d 1216 (2002).

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D. State Criminal Jurisdiction in Indian Matters

2. State Consensual Assumption of Criminal Jurisdiction in Indian Matters

§ 145. Federal and tribal consent to state assumption of jurisdiction

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West's Key Number Digest

West's Key Number Digest, [Indians](#)  260, 270

By statute, the consent of the United States is given to any state not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within the state to assume, with the consent of the Indian tribe, the measure of jurisdiction over offenses committed within the Indian country to the same extent that the State has jurisdiction over an offense committed elsewhere within the state, and the criminal laws of the state have the same force and effect within the Indian country as elsewhere within the state.¹ This provision does not limit application of the provision ceding criminal jurisdiction to various specified states² since by its own terms it cannot apply at all to states granted jurisdiction by other statutes.³

Observation:

Tribal consent is evidenced by a favorable majority vote of the enrolled adult Indians within the affected area of Indian country, voting at a special election held for that purpose,⁴ and mere legislative action by a tribal council is insufficient.⁵

Footnotes

- 1 25 U.S.C.A. § 1321(a)(1).
- 2 § 146.
- 3 U.S. v. Hoodie, 588 F.2d 292 (9th Cir. 1978).
- 4 25 U.S.C.A. § 1326.
- 5 Kennerly v. District Court of Ninth Judicial Dist. of Mont., 400 U.S. 423, 91 S. Ct. 480, 27 L. Ed. 2d 507 (1971).

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D. State Criminal Jurisdiction in Indian Matters

3. Federal Cession of Criminal Jurisdiction to State in Indian Matters

§ 146. Authority for federal cession of criminal jurisdiction to states

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West's Key Number Digest

West's Key Number Digest, [Indians](#)  260, 270

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[Construction and Application of s2 of Federal Public Law 280, Codified At 18 U.S.C.A. s1162, Under Which Congress Expressly Granted Several States Criminal Jurisdiction Over Matters Involving Indians, 55 A.L.R. Fed. 2d 35](#)

The federal government has generally ceded nonexclusive jurisdiction over criminal offenses committed by or against Indians in Indian country to various states, subject to limitations.¹ For other states, the federal ceding of jurisdiction over offenses committed by or against Indians in the listed areas of Indian country is to the same extent that the State has jurisdiction over offenses committed elsewhere in the state, and the criminal laws of the state have the same force and effect within Indian country as they have elsewhere in the state.² In other states, the ceding of jurisdiction is subject to certain exceptions and limitations.³

Observation:

Unlike the federal statutory grant of consensual jurisdiction to the states for their assumption of jurisdiction with federal and tribal consent,⁴ the general cession of criminal jurisdiction by the federal government to the states for offenses in Indian country and on Indian reservations does not require tribal consent.⁵

The grant of jurisdiction to the states is exclusive with respect to the Federal Indian Country Crimes Act⁶ and Indian Major Crimes Act⁷ as they do not apply within the listed areas of Indian country over which the states have exclusive jurisdiction⁸ except to the extent that, at the request of an Indian tribe, and after consultation with and consent by the Attorney General, those statutes will apply in the areas of the Indian country of the Indian tribe and jurisdiction over those areas will be concurrent among the federal government, state governments, and where applicable, tribal governments.⁹

CUMULATIVE SUPPLEMENT

Cases:

States empowered by Congress to exercise jurisdiction in Indian country may apply their own criminal laws to offenses committed by or against Indians within all Indian country within the State. 18 U.S.C.A. § 1162; Indian Civil Rights Act of 1968, §§ 405, 406, 25 U.S.C.A. §§ 1325, 1326; 25 U.S.C.A. §§ 1328, 1360. *U.S. v. Bryant*, 136 S. Ct. 1954 (2016).

[END OF SUPPLEMENT]

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Footnotes

- 1 18 U.S.C.A. § 3243; 25 U.S.C.A. § 232.
- 2 18 U.S.C.A. § 1162(a); 25 U.S.C.A. §§ 766(b), 1300b-15, 1300f(c).
- 3 25 U.S.C.A. § 1725.
- 4 § 145.
- 5 *State v. Abrahamson*, 157 Wash. App. 672, 238 P.3d 533 (Div. 1 2010).
- 6 § 153.
- 7 § 155.
- 8 18 U.S.C.A. § 1162(c).
- 9 18 U.S.C.A. § 1162(d).

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3. Federal Cession of Criminal Jurisdiction to State in Indian Matters

§ 147. Nature of state law as within cession of criminal jurisdiction

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West's Key Number Digest

West's Key Number Digest, [Indians](#)  274(2)

A.L.R. Library

[Construction and Application of s2 of Federal Public Law 280, Codified At 18 U.S.C.A. s1162, Under Which Congress Expressly Granted Several States Criminal Jurisdiction Over Matters Involving Indians, 55 A.L.R. Fed. 2d 35](#)

When a state seeks to enforce its law within an Indian reservation under the authority of the federal statute ceding to the state criminal jurisdiction,¹ it must be determined whether the state law is criminal in nature and thus fully applicable to the reservation.² If the intent of the state law is generally to prohibit certain conduct, it falls within the federal statute's grant of criminal jurisdiction over Indian country to states,³ but mere labeling of the state statute is not sufficient to control.⁴

Practice Tip:

Four nonexclusive factors are useful in determining whether an activity on an Indian reservation violates state public policy in a nature serious enough to be considered "criminal," as required for state law to be enforceable on an Indian reservation under a cession of jurisdiction: (1) the extent to which the activity directly threatens physical harm to persons or property or invades the

rights of others; (2) the extent to which the law allows for exceptions and exemptions; (3) the blameworthiness of the actor; and (4) the nature and severity of the potential penalties for a violation of the law.⁵

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Footnotes

- 1 § 146.
- 2 *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987); *State v. Losh*, 755 N.W.2d 736 (Minn. 2008).
- 3 *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987); *State v. Losh*, 755 N.W.2d 736 (Minn. 2008).
- 4 *State v. George*, 127 Idaho 693, 905 P.2d 626 (1995).
- 5 *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987); *State v. Losh*, 755 N.W.2d 736 (Minn. 2008).

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3. Federal Cession of Criminal Jurisdiction to State in Indian Matters

§ 148. Retrocession of state criminal jurisdiction to federal government

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West's Key Number Digest

West's Key Number Digest, [Indians](#)  260, 270

Definition:

"Retrocession" is the State's return to the federal government of jurisdiction over criminal matters previously granted to the State by Congress.¹

The Secretary of the Interior is authorized to accept a retrocession by any state of all or any measure of the criminal jurisdiction acquired by a state² pursuant to a prior federal ceding of criminal jurisdiction to the State.³ A retrocession, to be valid and effective, must be made in compliance with the statute.⁴ A state's retrocession of jurisdiction over Indian country is not effective until the federal government accepts it; the State retains jurisdiction until that date.⁵

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Footnotes

- ¹ [U.S. v. Merrick](#), 767 F. Supp. 1022 (D. Neb. 1991).
- ² 25 U.S.C.A. § 1323.
- ³ [§ 146](#).

4 Val/Del, Inc. v. Superior Court In and For Pima County, 145 Ariz. 558, 703 P.2d 502 (Ct. App. Div. 2 1985).
5 State v. Wabashaw, 274 Neb. 394, 740 N.W.2d 583, 55 A.L.R. Fed. 2d 631 (2007).

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West's A.L.R. Digest, [Double Jeopardy](#) 🔑 183.1

West's A.L.R. Digest, [Indians](#) 🔑 262 to 266, 270, 272, 273, 274(4), 275(4), 277, 278, 305 to 307, 309 to 311

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E. Federal Criminal Jurisdiction in Indian Matters

1. In General

a. Overview of Federal Criminal Jurisdiction in Indian Matters

§ 149. Original federal criminal jurisdiction in Indian matters

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West's Key Number Digest

West's Key Number Digest, [Indians](#)  [264](#), [265](#), [270](#), [272](#), [273](#), [274\(4\)](#), [275\(4\)](#), [277](#), [278](#)

The three basic hooks for federal criminal jurisdiction over Indians in Indian country are: (1) the Indian Country Crimes Act (ICCA); (2) the Indian Major Crimes Act (IMCA); and (3) peculiarly federal crimes as to which prosecution protects an independent federal interest.¹ Generally, federal district courts have original jurisdiction of all offenses against the laws of the United States,² specifically including, in Indian country,³ crimes under the ICCA when either the defendant or the victim, but not both, are Indian,⁴ crimes under the IMCA when committed by Indian defendants,⁵ and crimes punishable under generally applicable federal criminal laws when their application to Indians and Indian lands is not excluded.⁶

Reminder:

Federal criminal jurisdiction is subject to exceptions by which the State assumes jurisdiction with the consent of the federal government and the tribe,⁷ the federal government cedes jurisdiction in Indian criminal matters to states,⁸ or the federal government grants jurisdiction to tribal courts.⁹

Practice Tip:

The ICCA and the IMCA create a two-part inquiry for determining whether a federal court has subject matter jurisdiction over a federal enclave case arising in Indian country: first, the court must decide whether the case falls within the statutory intra-Indian exception of the ICCA, and second, if it does, the court must decide whether the IMCA operates to take the case back out of the exception.¹⁰

If the United States cedes criminal jurisdiction to a state,¹¹ the cession does not deprive any federal court of jurisdiction in any criminal action instituted for any offense committed before the effective date of the cession; for this purpose, the cession takes effect on the day following the date of final determination of the action.¹²

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Footnotes

- 1 U.S. v. Miller, 26 F. Supp. 2d 415 (N.D. N.Y. 1998).
- 2 18 U.S.C.A. § 3231.
- 3 §§ 151, 152.
- 4 § 153.
- 5 §§ 155 et seq.
- 6 § 150.
- 7 § 145.
- 8 § 146.
- 9 § 124.
- 10 U.S. v. Brisk, 171 F.3d 514, 51 Fed. R. Evid. Serv. 932 (7th Cir. 1999).
- 11 § 146.
- 12 25 U.S.C.A. § 1325(b).

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E. Federal Criminal Jurisdiction in Indian Matters

1. In General

a. Overview of Federal Criminal Jurisdiction in Indian Matters

§ 150. Applicability of general federal criminal laws in Indian matters

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West's Key Number Digest

West's Key Number Digest, [Indians](#)  [264](#), [265](#), [270](#), [272](#), [273](#), [274\(4\)](#), [275\(4\)](#), [277](#), [278](#)

The sole jurisdiction provision of the Indian Country Crimes Act (ICCA)¹ does not restrict the application of generally applicable federal criminal statutes to Indian reservations.² Likewise, the Indian Major Crimes Act (IMCA)³ is not exclusive of other federal criminal laws of nationwide applicability.⁴

A federal criminal statute of nationwide applicability that is otherwise silent on the question of jurisdiction as to Indian tribes will not apply to them if: (1) the law touches exclusive rights of self-governance in purely intramural matters; (2) the application of the law to the tribe would abrogate rights guaranteed by Indian treaties; or (3) there is proof by legislative history or some other means that Congress intended the law not to apply to Indians on their reservations.⁵ "Laws of nationwide applicability" are laws that make actions criminal wherever committed and apply to Indians within Indian country just as they apply elsewhere.⁶ Federal courts retain jurisdiction over violations of federal laws of general, nonterritorial applicability when the charged offenses do not include the situs of the offense as an element of the crime.⁷

CUMULATIVE SUPPLEMENT

Cases:

The Supreme Court has long required a clear expression of the intention of Congress before the state or federal government may try Indians for conduct on their lands. [McGirt v. Oklahoma](#), 140 S. Ct. 2452 (2020).

[END OF SUPPLEMENT]

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Footnotes

- 1 § 153.
- 2 U.S. v. Drapeau, 414 F.3d 869, 67 Fed. R. Evid. Serv. 867 (8th Cir. 2005).
- 3 §§ 155 et seq.
- 4 U.S. v. Gallaher, 275 F.3d 784 (9th Cir. 2001).
The absence of a particular criminal offense from the enumeration of offenses under the IMCA does not preclude the federal court's exercise of jurisdiction in a prosecution of an Indian charged with a crime against another Indian on the Indian reservation. U.S. v. Mitchell, 502 F.3d 931 (9th Cir. 2007).
- 5 U.S. v. Mitchell, 502 F.3d 931 (9th Cir. 2007).
- 6 U.S. v. Smith, 387 F.3d 826 (9th Cir. 2004).
- 7 U.S. v. Peltier, 344 F. Supp. 2d 539 (E.D. Mich. 2004).

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E. Federal Criminal Jurisdiction in Indian Matters

1. In General

b. Requirement of Crime Committed in Indian Country

§ 151. General definition and construction of Indian country

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West's Key Number Digest

West's Key Number Digest, [Indians](#)  263

The concept of "Indian country" is central to Indian criminal law because it is one of the factors which determines which sovereign has jurisdiction over the offense,¹ particularly in relation to the Indian Country Crimes Act² and the Indian Major Crimes Act.³ The Indian country concept is a nexus in federal law, without which there is no federal crime, and thus, it is, in only that sense, jurisdictional⁴ and presents a question of law for the court.⁵

Except as otherwise provided in relation to proscriptions against the dispensation or possession of intoxicants,⁶ Indian country is defined as:⁷

- (1) all land within the limits of an Indian reservation under the jurisdiction of the United States, notwithstanding the issuance of a patent, and including rights-of-way running through the reservation;
- (2) all dependent Indian communities within the borders of the United States, whether within original or subsequently acquired territory, and whether within or outside the limits of a state; and
- (3) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the allotment.

All lands within the exterior boundaries of the tribe's reservation are Indian country.⁸ Land owned by the United States in trust for Indian tribes is Indian country,⁹ including an Indian allotment, trust allotment, or restricted allotment, regardless whether

on or off a reservation,¹⁰ and that the title to the land is held by a non-Indian is not determinative if the property is within the boundaries of an Indian reservation.¹¹ The formality of the denomination of the land is not determinative, as whether it is trust land or reservation land, provided it is validly set apart for the use of Indians as such.¹² The land is Indian country notwithstanding the lack of a specific treaty, statute, or order creating a reservation, or that the land was incorporated into the boundaries of the tribe's original reservation by the tribe's purchase of the land.¹³

When an Indian reservation is diminished or disestablished, the area excluded from the reservation is no longer "Indian country."¹⁴ Congressional intent controls and the mere fact that a reservation has been opened to settlement does not necessarily mean that the opened area has lost its reservation status.¹⁵

Caution:

Indian lands owned in fee without restrictions on alienation in favor of the United States are not Indian country unless they are within the boundaries of an Indian reservation.¹⁶

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Footnotes

- 1 DeCoteau v. District County Court for Tenth Judicial Dist., 420 U.S. 425, 95 S. Ct. 1082, 43 L. Ed. 2d 300 (1975); Owen v. Weber, 646 F.3d 1105 (8th Cir. 2011); Mike v. Franchise Tax Bd., 182 Cal. App. 4th 817, 106 Cal. Rptr. 3d 139 (4th Dist. 2010); In re Estate of Big Spring, 2011 MT 109, 360 Mont. 370, 255 P.3d 121 (2011).
- 2 § 153.
- 3 §§ 155 et seq.
- 4 U.S. v. Tony, 637 F.3d 1153 (10th Cir. 2011).
The definition removes the uncertainty of federal jurisdiction of crimes committed by or against Indians within a reservation. Mike v. Franchise Tax Bd., 182 Cal. App. 4th 817, 106 Cal. Rptr. 3d 139 (4th Dist. 2010).
- 5 U.S. v. Papakee, 485 F. Supp. 2d 1032 (N.D. Iowa 2007).
- 6 §§ 164, 165.
- 7 18 U.S.C.A. § 1151.
- 8 U.S. v. Arrieta, 436 F.3d 1246 (10th Cir. 2006); Mike v. Franchise Tax Bd., 182 Cal. App. 4th 817, 106 Cal. Rptr. 3d 139 (4th Dist. 2010); In re Estate of Big Spring, 2011 MT 109, 360 Mont. 370, 255 P.3d 121 (2011).
- 9 HRI, Inc. v. E.P.A., 198 F.3d 1224 (10th Cir. 2000), as amended on denial of reh'g and reh'g en banc, (Mar. 30, 2000).
- 10 Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010 (8th Cir. 1999); In re Estate of Big Spring, 2011 MT 109, 360 Mont. 370, 255 P.3d 121 (2011).
- 11 U.S. v. Webb, 219 F.3d 1127 (9th Cir. 2000).
- 12 U.S. v. Roberts, 185 F.3d 1125, 52 Fed. R. Evid. Serv. 1020 (10th Cir. 1999); Michigan v. E.P.A., 268 F.3d 1075 (D.C. Cir. 2001); Ho-Chunk Nation v. Wisconsin Dept. of Revenue, 2008 WI App 95, 312 Wis. 2d 484, 754 N.W.2d 186 (Ct. App. 2008), decision aff'd, 2009 WI 48, 317 Wis. 2d 553, 766 N.W.2d 738 (2009).

- 13 U.S. v. Papakee, 485 F. Supp. 2d 1032 (N.D. Iowa 2007).
14 U.S. v. Webb, 219 F.3d 1127 (9th Cir. 2000).
15 Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 97 S. Ct. 1361, 51 L. Ed. 2d 660 (1977).
16 Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010 (8th Cir. 1999).

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b. Requirement of Crime Committed in Indian Country

§ 152. Dependent Indian community

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West's Key Number Digest

West's Key Number Digest, [Indians](#)  263

To constitute a "dependent Indian community," under the federal statutes designating three categories of "Indian country,"¹ the land must: (1) have been set aside by the federal government for the use of the Indians as Indian land; and (2) be under federal superintendence.²

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Footnotes

- ¹ § 151.
- ² [Owen v. Weber](#), 646 F.3d 1105 (8th Cir. 2011); [Hydro Resources, Inc. v. U.S. E.P.A.](#), 608 F.3d 1131 (10th Cir. 2010); [State v. Steven B.](#), 2013-NMCA-078, 306 P.3d 509 (N.M. Ct. App. 2013), cert. granted, 2013-NMCERT-007, 308 P.3d 134 (N.M. 2013) and rev'd on other grounds, 2015 WL 3904989 (N.M. 2015).

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41 Am. Jur. 2d Indians; Native Americans § 153

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E. Federal Criminal Jurisdiction in Indian Matters

2. Crimes by or Against Indians Under Indian Country Crimes Act

§ 153. Provisions and effect of Indian Country Crimes Act

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West's Key Number Digest

West's Key Number Digest, [Indians](#)  262, 270, 272, 273, 274(4), 275(4), 277, 278

Except as otherwise expressly provided by law, the Indian Country Crimes Act (ICCA) provides that the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States (federal enclaves), except the District of Columbia, extend to Indian country.¹ The ICCA does not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.²

The ICCA affords jurisdiction when either the defendant or the victim, but not both, are Indian,³ excepting Indian-on-Indian crimes,⁴ and does not give federal courts jurisdiction over victimless crimes by non-Indians in Indian country if there is neither an Indian victim nor an Indian perpetrator.⁵ The Indian/non-Indian statuses of the victim and the defendant are essential elements of the crime charges under the ICCA and the prosecution's failure to allege and present evidence on these elements is plain error.⁶

The elements of federal court jurisdiction under the ICCA for federal enclave crimes are that the crime is committed in Indian country⁷ and involves a person who has some Indian blood⁸ and who is a member of a tribe⁹ that is federally recognized.¹⁰ The subject federal crimes committed on Indian reservations are thus controlled by federal statutes and common law.¹¹

Observation:

The term "sole and exclusive" does not mean that the United States must have sole and exclusive jurisdiction over Indian country in order for the statute to apply; it merely describes the laws of the United States which are extended to Indian country.¹² By federal regulation,¹³ and statutory provision, the United States may, within certain tribal areas, accept concurrent state and tribal criminal jurisdiction to prosecute violations of the ICCA.¹⁴

Practice Tip:

The ICCA and the Indian Major Crimes Act create a two-part inquiry for determining whether a federal court has subject matter jurisdiction over a federal enclave case arising in Indian country.¹⁵

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Footnotes

- 1 18 U.S.C.A. § 1152.
As to what constitutes Indian country, see §§ 151, 152.
The "general federal laws" are known as "federal enclave laws." *U.S. v. Cowboy*, 694 F.2d 1228 (10th Cir. 1982).
- 2 18 U.S.C.A. § 1152.
- 3 *U.S. v. Maggi*, 598 F.3d 1073 (9th Cir. 2010).
- 4 *U.S. v. Yankton*, 168 F.3d 1096 (8th Cir. 1999).
- 5 *U.S. v. Langford*, 641 F.3d 1195 (10th Cir. 2011).
- 6 *U.S. v. Langford*, 641 F.3d 1195 (10th Cir. 2011).
- 7 *U.S. v. Loera*, 952 F. Supp. 2d 862 (D. Ariz. 2013).
- 8 *U.S. v. Diaz*, 679 F.3d 1183 (10th Cir. 2012).
- 9 *U.S. v. Maggi*, 598 F.3d 1073 (9th Cir. 2010); *U.S. v. Loera*, 952 F. Supp. 2d 862 (D. Ariz. 2013).
Tribal or government recognition as an Indian is required. *U.S. v. Martin*, 777 F.3d 984 (8th Cir. 2015), petition for certiorari filed, 135 S. Ct. 1882 (2015) and cert. denied, 2015 WL 2255901 (U.S. 2015); *U.S. v. Ramirez*, 537 F.3d 1075 (9th Cir. 2008).
As to tribal membership, generally, see § 18.
- 10 *U.S. v. Maggi*, 598 F.3d 1073 (9th Cir. 2010).
- 11 *U.S. v. Lesmeister*, 742 F. Supp. 2d 1064 (D.S.D. 2010).
- 12 *Ex parte Wilson*, 140 U.S. 575, 11 S. Ct. 870, 35 L. Ed. 513 (1891).
- 13 28 C.F.R. § 50.25.
- 14 18 U.S.C.A. § 1162(d).
- 15 § 149.

41 Am. Jur. 2d Indians; Native Americans § 154

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E. Federal Criminal Jurisdiction in Indian Matters

2. Crimes by or Against Indians Under Indian Country Crimes Act

§ 154. Incorporation and effect of Assimilative Crimes Act

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West's Key Number Digest

West's Key Number Digest, [Indians](#)  [270](#), [272](#), [273](#), [274\(4\)](#), [275\(4\)](#), [277](#), [278](#)

Under the Assimilative Crimes Act (ACA),¹ when conduct which would violate state law occurs on federal land, the relevant state law is assimilated into federal law unless there is already applicable federal law.² The ACA operates to fill the gap that occurs when the federal criminal code does not define an offense committed within the jurisdiction of the United States, incorporating state offenses defined by the state in which the federal land is located,³ and it is applicable to Indian country⁴ by virtue of the Indian Country Crimes Act.⁵ If the state criminal law and federal law overlap, the ACA does not apply and the federal definition of the crime is used.⁶

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Footnotes

- ¹ 18 U.S.C.A. § 13.
- ² U.S. v. Billadeau, 275 F.3d 692 (8th Cir. 2001); U.S. v. Langford, 641 F.3d 1195 (10th Cir. 2011).
The ACA does not assimilate state law which is inconsistent with federal policies expressed in federal statutes. *Cheyenne-Arapaho Tribes of Oklahoma v. State of Okl.*, 618 F.2d 665 (10th Cir. 1980).
- ³ U.S. v. Lesmeister, 742 F. Supp. 2d 1064 (D.S.D. 2010).
- ⁴ *Williams v. U.S.*, 327 U.S. 711, 66 S. Ct. 778, 90 L. Ed. 962 (1946); U.S. v. Billadeau, 275 F.3d 692 (8th Cir. 2001).
- ⁵ § 153.
- ⁶ U.S. v. Lesmeister, 742 F. Supp. 2d 1064 (D.S.D. 2010).

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E. Federal Criminal Jurisdiction in Indian Matters

3. Crimes by Indians Under Indian Major Crimes Act

§ 155. Provisions, effect, and validity of Indian Major Crimes Act

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Indians](#)  272, 274(4)

A.L.R. Library

[Validity, Construction, and Application of Indian Major Crimes Act, 184 A.L.R. Fed. 107](#)

Under the Indian Major Crimes Act (IMCA), an Indian who commits against the person or property of another Indian or other person specified crimes within Indian country is subject to the same laws and penalties as any other person committing such offenses within the exclusive jurisdiction (federal enclave) of the United States.¹ Any of the offenses listed in the IMCA² that are not defined and punished by federal law in force within the exclusive jurisdiction of the United States are to be defined and punished in accordance with the laws of the state where the offense was committed, as in force at the time of the offense.³

Observation:

The IMCA governs an area where Congress has traditionally held plenary and exclusive power and thus Congress did not exceed its powers under the Indian Commerce Clause of the United States Constitution⁴ when enacting the IMCA.⁵ The IMCA does not

violate equal protection by creating exclusive federal jurisdiction over specified crimes by Indians in Indian country and defining the crimes by state law.⁶

CUMULATIVE SUPPLEMENT

Statutes:

[25 U.S.C.A. §§ 5701 to 5705](#), as added effective October 10, 2020, enact provisions regarding responsibilities of Federal, state, tribal, and local law enforcement agencies responding to cases of missing or murdered Indians as follows: to increase coordination and communication among Federal, state, tribal, and local law enforcement agencies, including medical examiner and coroner offices ([25 U.S.C.A. § 5704](#)); to empower tribal governments with the resources and information necessary to effectively respond to cases of missing or murdered Indians ([25 U.S.C.A. § 5705](#)); and to increase the collection of data related to missing or murdered Indian men, women, and children, regardless of where they reside, and the sharing of information among Federal, state, and tribal officials responsible for responding to and investigating cases of missing or murdered Indians ([25 U.S.C.A. § 5703](#)).

[END OF SUPPLEMENT]

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Footnotes

- 1 [18 U.S.C.A. § 1153\(a\)](#) (specifying the crimes of: murder, manslaughter, kidnapping, maiming, a specified felony, incest, felony assault with intent to commit murder, specified assaults, felony child abuse or neglect, arson, burglary, and robbery).
- 2 [18 U.S.C.A. § 1153\(a\)](#).
- 3 [18 U.S.C.A. § 1153\(b\)](#).
- 4 U.S. Const. Art. I, § 8, cl. 3.
- 5 [U.S. v. Lomayaoma](#), 86 F.3d 142 (9th Cir. 1996).
- 6 [U.S. v. Vallie](#), 284 F.3d 917, 58 Fed. R. Evid. Serv. 1400 (8th Cir. 2002).

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41 Am. Jur. 2d Indians; Native Americans § 156

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E. Federal Criminal Jurisdiction in Indian Matters

3. Crimes by Indians Under Indian Major Crimes Act

§ 156. Jurisdiction and venue under Indian Major Crimes Act

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West's Key Number Digest

West's Key Number Digest, [Indians](#)  272, 274(4)

A.L.R. Library

[Validity, Construction, and Application of Indian Major Crimes Act, 184 A.L.R. Fed. 107](#)

The Indian Major Crimes Act (IMCA)¹ creates federal jurisdiction for cases in which an Indian commits one of a list of enumerated crimes against another Indian or other person in Indian country.² The IMCA's jurisdictional counterpart provides that an Indian who commits an offense punishable under the IMCA will be tried in the same courts and in the same manner as are all other persons committing such offenses within the exclusive jurisdiction of the United States.³

Congress intended full implementation of federal criminal jurisdiction under the IMCA, without regard to any contrary treaty provisions,⁴ and the federal courts have exclusive jurisdiction over the offenses enumerated in the IMCA.⁵ However, by federal regulation⁶ and statutory provision, the United States may, within certain tribal areas, accept concurrent state and tribal criminal jurisdiction to prosecute violations of the IMCA.⁷

Observation:

The IMCA has no bearing on federal laws of nationwide applicability that make actions criminal wherever committed,⁸ and the IMCA does not apply to those states which, pursuant to federal statute, have jurisdiction to hear controversies involving offenses committed by or against Indians whether by consensual assumed jurisdiction⁹ or ceded jurisdiction.¹⁰

Practice Tip:

The IMCA and the Indian Country Crimes Act create a two-part inquiry for determining whether a federal court has subject matter jurisdiction over an enclave law case arising in Indian country.¹¹

The proper venue in prosecutions of Indians under the IMCA is generally where the crime was committed.¹²

CUMULATIVE SUPPLEMENT

Cases:

Federal prosecution of defendant Indian member of Confederated Tribes of Warm Springs for fleeing or attempting to elude police officer under Assimilative Crimes Act (ACA) and Indian Country Crimes Act (ICCA) was not unlawful intrusion into tribal sovereignty, but rather permissible exercise of concurrent jurisdictional authority often held by different sovereigns in Indian country. [18 U.S.C.A. §§ 7, 1152](#); [Or. Rev. Stat. § 811.540\(1\)](#). [United States v. Smith](#), 925 F.3d 410 (9th Cir. 2019).

[END OF SUPPLEMENT]

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Footnotes

- 1 [§ 155.](#)
- 2 [U.S. v. Smith](#), 681 F.3d 932 (8th Cir. 2012); [U.S. v. Maggi](#), 598 F.3d 1073 (9th Cir. 2010).
- 3 [18 U.S.C.A. § 3242.](#)
- 4 [U.S. v. Jacobs](#), 638 F.3d 567 (8th Cir. 2011).
- 5 [U. S. v. John](#), 437 U.S. 634, 98 S. Ct. 2541, 57 L. Ed. 2d 489 (1978); [U.S. v. Jones](#), 440 F.3d 927 (8th Cir. 2006).
- 6 [28 C.F.R. § 50.25.](#)

7 18 U.S.C.A. § 1162(d).
8 § 150.
9 § 145.
10 § 146.
11 § 149.
12 *Gourneau v. U.S.*, 390 F.2d 320 (8th Cir. 1968).

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41 Am. Jur. 2d Indians; Native Americans § 157

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E. Federal Criminal Jurisdiction in Indian Matters

3. Crimes by Indians Under Indian Major Crimes Act

§ 157. Essential elements of jurisdiction and crime under Indian Major Crimes Act

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Indians](#)  272, 274(4)

A.L.R. Library

[Validity, Construction, and Application of Indian Major Crimes Act, 184 A.L.R. Fed. 107](#)

Under the Indian Major Crimes Act (IMCA)¹ the elements essential to the jurisdiction of a federal court² are that the accused is an Indian³ and that the accused committed the offense within the limits of Indian country.⁴

The IMCA does not create specific crimes; it merely allows for the federal prosecution of substantive offenses defined elsewhere.⁵ The IMCA does not define the elements of the crimes it lists for federal enforcement, and the federal government may use state law to define the crime and the applicable punishment.⁶ For federal law to define an offense under the IMCA, the law used to define an offense must contain all descriptors Congress used to label the crime.⁷

The test for Indian status under the IMCA is: (1) whether the defendant's bloodline is derived from a federally recognized tribe, and (2) the defendant's tribal or government recognition as an Indian.⁸ Members of tribes whose official status has been terminated by congressional enactment are not subject to federal criminal jurisdiction under the IMCA.⁹

Observation:

The Bureau of Indian Affairs (BIA) is not a "person" within the meaning of the IMCA such that a charged offense of burglary of the BIA building on an Indian reservation is not a violation of a law of the United States for purposes of jurisdiction under the IMCA.¹⁰

CUMULATIVE SUPPLEMENT

Cases:

Congress established a reservation for Creek Nation, as relevant to determining whether area of land was Indian Country under federal Major Crimes Act (MCA); even though early treaties did not refer to Creek lands as reservation, treaties solemnly guaranteed land and established boundary lines to secure permanent home to Creek Nation, later treaty that reduced size of land restated commitment that remaining land would be forever set apart as home for Creek Nation and referred to lands as reduced Creek reservation, and Creek were assured right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any State. [18 U.S.C.A. § 1151\(a\)](#); Treaty with the Creek Nation of Indians, Arts. 3, 9, June 14, 1866, 14 Stat. 786; Treaty with the Creek Nation of Indians, Arts. 4, 15, 1856, 11 Stat. 700; Treaty with the Creek Nation of Indians, Arts. 3, 9, 1833, 7 Stat. 418, 420; Treaty with the Creek Nation of Indians, Arts. 1, 12, 14, 15, 1832, 7 Stat. 366, 367, 368. [McGirt v. Oklahoma](#), 140 S. Ct. 2452 (2020).

Eastern Oklahoma is not exempt from the federal Major Crimes Act's (MCA) provision allowing only the federal government to try certain crimes committed by American Indians in Indian country. [18 U.S.C.A. §§ 1151, 1153\(a\)](#). [McGirt v. Oklahoma](#), 140 S. Ct. 2452 (2020).

In determining Indian status under jurisdictional statute extending reach of federal criminal laws to Indian country, unless offense is committed by one Indian against another Indian, where a defendant frequently received healthcare services on the basis of his status as a descendent of an enrolled member, he enjoyed the benefits of his tribal affiliation. [18 U.S.C.A. § 1152](#). [United States v. Loera](#), 190 F. Supp. 3d 873 (D. Ariz. 2016).

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Footnotes

- 1 [§ 155](#).
- 2 [§ 157](#).
- 3 [U.S. v. Stymiest](#), 581 F.3d 759 (8th Cir. 2009); [U.S. v. Zepeda](#), 738 F.3d 201 (9th Cir. 2013), reh'g en banc granted, 742 F.3d 910 (9th Cir. 2014).
The indictment must allege the defendant's status as an Indian within the meaning of the IMCA. [U.S. v. Graham](#), 572 F.3d 954 (8th Cir. 2009), as corrected, (Oct. 23, 2009); [U.S. v. Juvenile Male](#), 666 F.3d 1212 (9th Cir. 2012).
- 4 [U.S. v. Smith](#), 681 F.3d 932 (8th Cir. 2012).
As to what constitutes Indian country, see §§ [151](#), [152](#).

- 5 U.S. v. Gallaher, 624 F.3d 934 (9th Cir. 2010).
6 U.S. v. Other Medicine, 596 F.3d 677 (9th Cir. 2010).
The offense underlying the Federal IMCA prosecution may be defined by state law. U.S. v. Smith, 387 F.3d
826 (9th Cir. 2004).
7 U.S. v. Ganadonegro, 854 F. Supp. 2d 1068 (D.N.M. 2012).
8 U.S. v. Stymiest, 581 F.3d 759 (8th Cir. 2009); U.S. v. Zepeda, 738 F.3d 201 (9th Cir. 2013), reh'g en banc
granted, 742 F.3d 910 (9th Cir. 2014).
9 U. S. v. Antelope, 430 U.S. 641, 97 S. Ct. 1395, 51 L. Ed. 2d 701 (1977).
10 U.S. v. Errol D., Jr., 292 F.3d 1159, 184 A.L.R. Fed. 611 (9th Cir. 2002).

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E. Federal Criminal Jurisdiction in Indian Matters

3. Crimes by Indians Under Indian Major Crimes Act

§ 158. Former jeopardy under Indian Major Crimes Act

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West's Key Number Digest

West's Key Number Digest, [Double Jeopardy](#)  183.1

A.L.R. Library

[Validity of Federal Prosecution Subsequent to Tribal Court Prosecution](#), 190 A.L.R. Fed. 625

Under the Indian Major Crimes Act (IMCA),¹ the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution does not bar the prosecution of an Indian in federal district court under the IMCA even though the Indian was previously convicted in a tribal court of a lesser included offense arising out of the same incident.² Because the power of an Indian tribal court to punish tribal offenders is part of inherent tribal sovereignty, the tribal prosecution is that of an independent sovereign, not as an arm of the federal government,³ rendering the Double Jeopardy Clause inapplicable after a prosecution and punishment by a tribe.⁴ The principle applies as well when the prior tribal prosecution is of an Indian nonmember of the tribe.⁵

Observation:

The prohibition in the Indian Country Crimes Act against its application to offenses committed in Indian country by an Indian who has been punished by tribal law⁶ does not apply to the IMCA.⁷

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Footnotes

- 1 § 155.
- 2 U. S. v. Wheeler, 435 U.S. 313, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978).
- 3 U. S. v. Wheeler, 435 U.S. 313, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978); U.S. v. Antelope, 548 F.3d 1155 (8th Cir. 2008).
- 4 U.S. v. Lara, 541 U.S. 193, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (2004); U.S. v. Taylor, 135 Fed. Appx. 84 (9th Cir. 2005); U.S. v. Tony, 637 F.3d 1153 (10th Cir. 2011).
- 5 U.S. v. Lara, 541 U.S. 193, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (2004).
- 6 § 153.
- 7 U.S. v. Male Juvenile, 280 F.3d 1008 (9th Cir. 2002).

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E. Federal Criminal Jurisdiction in Indian Matters

3. Crimes by Indians Under Indian Major Crimes Act

§ 159. Burden and standard of proof under Indian Major Crimes Act

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West's Key Number Digest

West's Key Number Digest, [Indians](#)  274(4), 306

A.L.R. Library

[Validity, Construction, and Application of Indian Major Crimes Act, 184 A.L.R. Fed. 107](#)

In the prosecution of an Indian under the Indian Major Crimes Act (IMCA),¹ the government bears the burden of proof to sustain the jurisdiction of the federal court.² The government must prove that the offense was committed by an Indian in Indian country³ and must prove every essential element of the crime beyond a reasonable doubt.⁴

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Footnotes

- ¹ § 155.
- ² [U.S. v. Tarnow](#), 705 F.3d 809, 90 Fed. R. Evid. Serv. 815 (8th Cir. 2013); [U.S. v. Juvenile Male](#), 666 F.3d 1212 (9th Cir. 2012).
- ³ [U.S. v. Jackson](#), 697 F.3d 670 (8th Cir. 2012); [U.S. v. Juvenile Male](#), 666 F.3d 1212 (9th Cir. 2012).
- ⁴ [U.S. v. Martin](#), 777 F.3d 984 (8th Cir. 2015), petition for certiorari filed, 135 S. Ct. 1882 (2015) and cert. denied, 2015 WL 2255901 (U.S. 2015); [U.S. v. Goldtooth](#), 754 F.3d 763 (9th Cir. 2014).

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3. Crimes by Indians Under Indian Major Crimes Act

§ 160. Evidence and admissibility under Indian Major Crimes Act

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West's Key Number Digest

West's Key Number Digest, [Indians](#)  305 to 307

In the prosecution of an Indian under the Indian Major Crimes Act (IMCA),¹ the Federal Rules of Evidence apply.² Federal law, not tribal law or state law, governs evidence in the prosecution of IMCA offenses.³

The essential elements of a charge may be proved by either direct or circumstantial evidence.⁴ A stipulation of fact will suffice as proof of an essential element of the charged offense, provided it is knowing and voluntary, including a stipulation that the defendant is an Indian.⁵

If a search is conducted pursuant to a search warrant issued by a tribal judge, any evidence obtained pursuant to the warrant is inadmissible in a federal prosecution because a tribal court is not authorized to issue federal search warrants⁶ under the Federal Rules of Criminal Procedure.⁷

The examination of witnesses⁸ and the application of witness privileges in federal prosecutions under the IMCA are governed by the Federal Rules of Evidence.⁹

The order of the presentation of evidence is subject to the court's reasonable exercise of discretion, absent a showing of prejudice to the defendant.¹⁰

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Footnotes

- 1 § 155.
- 2 U.S. v. Tarnow, 705 F.3d 809, 90 Fed. R. Evid. Serv. 815 (8th Cir. 2013); U.S. v. Demery, 674 F.3d 776 (8th Cir. 2011).
- 3 U.S. v. Long, 30 F. Supp. 3d 835 (D.S.D. 2014).
- 4 U.S. v. Knife, 592 F.2d 472, 4 Fed. R. Evid. Serv. 284 (8th Cir. 1979); U.S. v. Brady, 579 F.2d 1121 (9th Cir. 1978).
- 5 U.S. v. Martin, 777 F.3d 984 (8th Cir. 2015), petition for certiorari filed, 135 S. Ct. 1882 (2015) and cert. denied, 2015 WL 2255901 (U.S. 2015).
A stipulated certificate of tribal enrollment is not alone sufficient to establish Indian status, absent evidence of a bloodline from a recognized tribe. U.S. v. Zepeda, 738 F.3d 201 (9th Cir. 2013), reh'g en banc granted, 742 F.3d 910 (9th Cir. 2014).
- 6 U.S. v. Messerly, 530 F. Supp. 751 (D. Mont. 1982).
- 7 Fed. R. Crim. P. 41.
- 8 U.S. v. Littlewind, 551 F.2d 244, 1 Fed. R. Evid. Serv. 837 (8th Cir. 1977).
- 9 U.S. v. Tsinnijinnie, 601 F.2d 1035, 4 Fed. R. Evid. Serv. 585 (9th Cir. 1979).
- 10 U.S. v. Doe, 572 F.3d 1162 (10th Cir. 2009).

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E. Federal Criminal Jurisdiction in Indian Matters

3. Crimes by Indians Under Indian Major Crimes Act

§ 161. Jury instructions under Indian Major Crimes Act

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West's Key Number Digest

West's Key Number Digest, [Indians](#)  309

In the prosecution of an Indian under the Indian Major Crimes Act (IMCA),¹ the court's instructions to the jury are a matter for the discretion of the trial court² and must meet the standard of legal correctness in stating the burden of proof.³ If the defense fails to request an appropriate instruction, the failure is fatal to the defendant's claim of error on appeal.⁴ When the facts and the evidence merit a jury instruction regarding a lesser included offense, the Indian defendant is entitled to request that the jury be instructed that it may convict on a lesser-included offense⁵ provided the request is timely made.⁶

A district court properly refuses to submit requested instructions to the jury which incorrectly state the law⁷ or which are unsupported by the evidence.⁸

The Indian defendant must object to a jury charge, or the court's failure to give a requested instruction, before the jury retires to consider its verdict.⁹

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Footnotes

¹ § 155.

² [U.S. v. Ramirez](#), 537 F.3d 1075 (9th Cir. 2008).

The court's failure to submit the question of the defendant's Indian status to the jury is not harmless error since the prosecution bears the burden of proof on the question. [U.S. v. Bruce](#), 394 F.3d 1215 (9th Cir. 2005).

³ [U.S. v. Rantanen](#), 467 Fed. Appx. 414 (6th Cir. 2012).

- 4 U.S. v. Lone Bear, 579 F.2d 522 (9th Cir. 1978).
5 Keeble v. U.S., 412 U.S. 205, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973).
6 U.S. v. Fay, 668 F.2d 375, 9 Fed. R. Evid. Serv. 1200 (8th Cir. 1981).
7 U.S. v. Webster, 620 F.2d 640, 55 A.L.R. Fed. 890 (7th Cir. 1980); U.S. v. Fay, 668 F.2d 375, 9 Fed. R. Evid. Serv. 1200 (8th Cir. 1981).
8 U.S. v. Lincoln, 630 F.2d 1313 (8th Cir. 1980); U.S. v. Skinner, 667 F.2d 1306, 9 Fed. R. Evid. Serv. 1599 (9th Cir. 1982).
9 U.S. v. Parisien, 574 F.2d 974 (8th Cir. 1978); U.S. v. Lone Bear, 579 F.2d 522 (9th Cir. 1978).

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IX. Civil and Criminal Courts and Proceedings in Indian Matters

E. Federal Criminal Jurisdiction in Indian Matters

3. Crimes by Indians Under Indian Major Crimes Act

§ 162. Judgment and sentence under Indian Major Crimes Act

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[Validity, Construction, and Application of Indian Major Crimes Act, 184 A.L.R. Fed. 107](#)

In the prosecution of an Indian under the Indian Major Crimes Act (IMCA),¹ sentencing must comply with standards of procedural reasonableness,² and federal sentencing guidelines apply.³ Sentences may not reasonably exceed the maximum term allowed for the offense.⁴ A finding of facts sufficient to support a sentence enhancement under mandatory sentencing guidelines must meet a standard of sufficiency beyond a reasonable doubt or constitute plain error affecting the defendant's substantial rights.⁵

When the IMCA applies assimilated state offenses, the IMCA assimilates the range of punishment set forth by state law for those offenses, but federal sentencing guidelines remain applicable and controlling.⁶ An error in basing a sentence on the Federal Assimilative Crimes Act, instead of the IMCA under which the defendant is charged, is harmless error when the sentencing procedure is the same.⁷

A federal district court has jurisdiction to enter judgment and sentence an Indian defendant on a lesser-included offense even though the lesser offense is not specifically enumerated in the IMCA.⁸

CUMULATIVE SUPPLEMENT

Cases:

Defendant's 300-month sentence for second-degree murder within Indian country, for shooting victim while he was sitting in a minivan with two other occupants, was substantively reasonable; it was not unreasonable for district court to conclude that defendant engaged in a heinous use of a firearm by firing a gun multiple times into a minivan occupied by three people, putting all of them in serious risk of serious injury or death, and court was not required to treat defendant's assertion that he freaked out and fired out of fear after seeing a firearm within reach of victim in the minivan as a mitigating factor that warranted a more lenient sentence. [18 U.S.C.A. § 3553\(a\)](#). [United States v. Shoulders](#), 988 F.3d 1061 (8th Cir. 2021).

In sentencing defendant pursuant to Indian Major Crimes Act (IMCA), federal sentencing courts may not incorporate and apply state suspension provisions to depart from state mandatory minimum sentence. [18 U.S.C.A. §§ 1153\(b\), 3551\(a\)](#). [United States v. Jones](#), 921 F.3d 932 (10th Cir. 2019).

[END OF SUPPLEMENT]

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Footnotes

- 1 [§ 155](#).
- 2 [U.S. v. Rantanen](#), 467 Fed. Appx. 414 (6th Cir. 2012).
- 3 [U.S. v. Crow](#), 148 F.3d 1048 (8th Cir. 1998); [U.S. v. Drewry](#), 133 Fed. Appx. 543 (10th Cir. 2005); [U.S. v. Wood](#), 386 F.3d 961 (10th Cir. 2004).
State law does not govern sentencing under the IMCA. [Rossbach v. U.S.](#), 878 F.2d 1088 (8th Cir. 1989).
- 4 [U.S. v. Demery](#), 674 F.3d 776 (8th Cir. 2011).
- 5 [U.S. v. Drewry](#), 133 Fed. Appx. 543 (10th Cir. 2005).
- 6 [U.S. v. Norquay](#), 905 F.2d 1157 (8th Cir. 1990); [U.S. v. Wood](#), 386 F.3d 961 (10th Cir. 2004).
- 7 [U.S. v. Wood](#), 386 F.3d 961 (10th Cir. 2004).
- 8 [U.S. v. Bowman](#), 679 F.2d 798 (9th Cir. 1982).

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E. Federal Criminal Jurisdiction in Indian Matters

3. Crimes by Indians Under Indian Major Crimes Act

§ 163. Appeal and review under Indian Major Crimes Act

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Under the Indian Major Crimes Act (IMCA),¹ the federal court of appeals reviews the sufficiency of the evidence de novo as to Indian status because it presents a mixed question of fact and law.² The court reviews sufficiency of the evidence challenges de novo to determine whether, viewing the evidence in the light most favorable to the government, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt,³ but the court does not weigh conflicting evidence or evaluate witness credibility.⁴ When the record shows insufficient evidence, the reviewing court may vacate the judgment and direct dismissal of the charge.⁵

The court reviews the formulation of jury instructions for abuse of discretion, and even if the instructions are imperfect, the court will not overturn a conviction absent a showing of prejudice to the defendant.⁶

The court will not disturb a conviction for an error or omission deemed harmless, but for an indictment's failure to allege the essential elements of the crime to be harmless, the omitted elements must be uncontested and supported by overwhelming evidence such that the jury verdict would have been the same absent the error.⁷

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Footnotes

¹ [§ 155.](#)

² [U.S. v. Juvenile Male, 666 F.3d 1212 \(9th Cir. 2012\).](#)

The failure to submit the question of the defendant's Indian status to the jury is not harmless error since it relieves the prosecution of its burden of proof. [U.S. v. Bruce, 394 F.3d 1215 \(9th Cir. 2005\)](#).

3 [U.S. v. Goldtooth, 754 F.3d 763 \(9th Cir. 2014\)](#); [U.S. v. Doe, 572 F.3d 1162 \(10th Cir. 2009\)](#).

4 [U.S. v. Doe, 572 F.3d 1162 \(10th Cir. 2009\)](#).

5 [U.S. v. DuBois, 645 F.2d 642 \(8th Cir. 1981\)](#).

6 [U.S. v. Ramirez, 537 F.3d 1075 \(9th Cir. 2008\)](#).

7 [U.S. v. Doe, 572 F.3d 1162 \(10th Cir. 2009\)](#).

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F. Offenses Relating to Indian Country Liquor Laws

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IX. Civil and Criminal Courts and Proceedings in Indian Matters


F. Offenses Relating to Indian Country Liquor Laws

1. Federal and Tribal Liquor Authority and Regulation

§ 164. Federal and tribal liquor regulatory authority in Indian country

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West's Key Number Digest

West's Key Number Digest, [Indians](#)  320, 323

Under the United States Constitution's Indian Commerce Clause,¹ which give Congress power to regulate commerce with Indian tribes, Congress has the authority to control the sale of alcoholic beverages on lands located within the boundaries of an Indian reservation even though the lands are held in fee by non-Indians and even though the persons regulated are non-Indians.² Accordingly, Congress has enacted various statutory provisions regarding intoxicants dispensed or introduced in Indian country, unlawful possession of intoxicants, searches and seizures, the possession of intoxicating liquor as evidence of unlawful introduction, and forfeitures.³ However, by statute, these provisions are expressly made inapplicable: (1) within any area that is not Indian country; or (2) to any act or transaction within any area of Indian country if the act or transaction is in conformity with both the laws of the state in which it occurs and with an ordinance duly adopted by the tribe having jurisdiction over the area of Indian country, certified by the Secretary of the Interior.⁴ Thus, Congress has vested in the states⁵ and tribes part of its constitutional authority to regulate the distribution and use of an intoxicant⁶ and to remove the federal liquor prohibition in Indian country.⁷ The statute does not, however, withdraw federal jurisdiction over violations.⁸

Observation:

The geographic scope of tribal and state authority extends to the reservation's four corners since the applicable definition of Indian country for the purpose of the delegation of regulatory authority to the tribes and states is the broad definition as all land within the limits of any Indian reservation notwithstanding the issuance of any patent.⁹

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Footnotes

- 1 U.S. Const. Art. I, § 8, cl. 3.
- 2 U. S. v. Mazurie, 419 U.S. 544, 95 S. Ct. 710, 42 L. Ed. 2d 706 (1975).
- 3 18 U.S.C.A. §§ 1154, 1156, 3113, 3488, 3669.
As to prohibitions of liquor or intoxicants in Indian country, see § 165.
- 4 18 U.S.C.A. § 1161.
- 5 Furry v. Miccosukee Tribe of Indians of Florida, 685 F.3d 1224 (11th Cir. 2012).
- 6 U. S. v. Mazurie, 419 U.S. 544, 95 S. Ct. 710, 42 L. Ed. 2d 706 (1975); City of Timber Lake v. Cheyenne River Sioux Tribe, 10 F.3d 554 (8th Cir. 1993).
- 7 Furry v. Miccosukee Tribe of Indians of Florida, 685 F.3d 1224 (11th Cir. 2012).
- 8 U.S. v. Cowboy, 694 F.2d 1228 (10th Cir. 1982).
- 9 City of Timber Lake v. Cheyenne River Sioux Tribe, 10 F.3d 554 (8th Cir. 1993).

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IX. Civil and Criminal Courts and Proceedings in Indian Matters

F. Offenses Relating to Indian Country Liquor Laws

1. Federal and Tribal Liquor Authority and Regulation

§ 165. Prohibitions of liquor or intoxicants in Indian country

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West's Key Number Digest

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Subject to federal authorization of state and tribal licensing and approval,¹ the possession of intoxicating liquor in Indian country is prohibited, except for scientific, sacramental, medicinal, or mechanical purposes; for this purpose, Indian country does not include fee-patented lands in non-Indian communities or rights-of-way through Indian reservations in the absence of a treaty or statute extending the Indian liquor laws thereto.² The prohibited possession by a person of intoxicating liquor in Indian country is prima facie evidence of unlawful introduction.³ In addition, excepting fee-patented lands in non-Indian communities or rights-of-way through Indian reservations⁴ and excepting scientific, sacramental, medicinal, or mechanical purposes, federal law prohibits:⁵

- (1) the sale, gift, disposing of, exchange, or bartering of intoxicants to any Indian to whom a land allotment has been made while title to the land is held in trust by the government, or to any Indian who is a ward of the government under charge of any Indian superintendent, or to any Indian, including mixed bloods, over whom the government, through its departments, exercises guardianship; and
- (2) the introduction or attempt to introduce any intoxicants into Indian country.

Observation:

The narrow definition of Indian country in the federal criminal statutes that prohibit the introduction of liquor into Indian country and the possession of alcohol in Indian country applies only to the reach of these statutes⁶ and does not govern the statute delegating authority to states and Indian tribes to regulate the use and distribution of alcoholic beverages in Indian country.⁷

CUMULATIVE SUPPLEMENT

Statutes:

[25 U.S.C.A. § 251](#) was repealed effective December 11, 2018. As to the current similar provision, see [25 U.S.C.A. § 251](#) Note.

[END OF SUPPLEMENT]

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Footnotes

1 [§ 164.](#)

2 [18 U.S.C.A. § 1156.](#)

Setting up a distillery in Indian county is subject to a penalty. [25 U.S.C.A. § 251.](#)

It is not unlawful to introduce wines solely for sacramental purposes under church authority in Indian country. [25 U.S.C.A. § 253.](#)

It is unlawful to dispense intoxicants on any tract of land in former Indian country on which is located any Indian school under the supervision of the United States except for scientific, sacramental, medicinal, or mechanical purposes. [18 U.S.C.A. § 1155.](#)

3 [18 U.S.C.A. § 3488.](#)

4 [18 U.S.C.A. § 1154\(c\).](#)

5 [18 U.S.C.A. § 1154\(a\).](#)

6 [City of Timber Lake v. Cheyenne River Sioux Tribe, 10 F.3d 554 \(8th Cir. 1993\).](#)

7 [§ 164.](#)

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F. Offenses Relating to Indian Country Liquor Laws

1. Federal and Tribal Liquor Authority and Regulation

§ 166. Search and forfeiture of intoxicants in Indian country

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A superintendent of Indian affairs, commanding officer of a military post, or special agent or authorized deputy of the Office of Indian Affairs for the suppression of liquor traffic among Indians, who has probable cause to believe that a person is about to introduce or has introduced any intoxicating liquor into Indian country in violation of law, may cause the places, conveyances, and packages of the person to be searched.¹

If intoxicants are found in Indian country in violation of law pursuant to an authorized search, they and the conveyances and packages of the person introducing or attempting to introduce the liquor may be proceeded against by libel in the proper court and forfeited, one-half to the informer and one-half to the use of the United States.² Any conveyance, whether used by the owner or another person in introducing or attempting to introduce intoxicants into Indian country, or into other places where the introduction is prohibited by treaty or congressional enactment, is subject to seizure, libel, and forfeiture.³

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Footnotes

- ¹ [18 U.S.C.A. § 3113.](#)
- ² [18 U.S.C.A. § 3113.](#)
- ³ [18 U.S.C.A. § 3669.](#)

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F. Offenses Relating to Indian Country Liquor Laws

2. State Liquor Authority and Regulation

§ 167. Federal authorization; state enforcement of liquor laws in Indian country

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State regulation over Indian liquor transactions is authorized, and not preempted, by the federal statute¹ providing that liquor transactions in Indian country are not subject to prohibition under federal law if such transactions are in conformity with state laws and tribal ordinances.² States have the authority to require Native American tribes that sell alcohol on tribal land to obtain a state liquor license.³ A state may maintain criminal prosecutions of Indians in state court for on-reservation liquor law violations,⁴ including prosecutions for alcohol related motor vehicle violations on the reservation.⁵

The federal statute governing the application of Indian liquor laws and state regulation and licensing does not abrogate tribal sovereign immunity from private tort suits for purposes of a state dram shop act or other tort law, and the tribe's compliance with state licensing is not a waiver of its immunity.⁶

A state's prohibition against a liquor licensee's serving alcohol to an obviously intoxicated person constitutes permissible regulation of an Indian tribe, but the State's regulatory authority is not, in itself, authority for a suit against the tribe in violation of tribal immunity.⁷

CUMULATIVE SUPPLEMENT

Cases:

Federal law permits the Omaha Tribe to regulate liquor sales on its reservation and in Indian country so long as the Tribe's regulations are certified by the Secretary of the Interior, and published in the Federal Register. [18 U.S.C.A. § 1161](#). [Nebraska v. Parker, 136 S. Ct. 1072 \(2016\)](#).

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Footnotes

- 1 [18 U.S.C.A. § 1161](#).
- 2 [Rice v. Rehner, 463 U.S. 713, 103 S. Ct. 3291, 77 L. Ed. 2d 961 \(1983\)](#); [Furry v. Miccosukee Tribe of Indians of Florida, 685 F.3d 1224 \(11th Cir. 2012\)](#).
As to what constitutes Indian country for this purpose, see [§ 164](#).
- 3 [Sheffer v. Buffalo Run Casino, PTE, Inc., 2013 OK 77, 315 P.3d 359 \(Okla. 2013\)](#).
- 4 [Fort Belknap Indian Community of Fort Belknap Indian Reservation v. Mazurek, 43 F.3d 428 \(9th Cir. 1994\)](#).
- 5 [State v. Robinson, 572 N.W.2d 720 \(Minn. 1997\)](#).
- 6 [Furry v. Miccosukee Tribe of Indians of Florida, 685 F.3d 1224 \(11th Cir. 2012\)](#); [Filer v. Tohono O'Odham Nation Gaming Enterprise, 212 Ariz. 167, 129 P.3d 78 \(Ct. App. Div. 2 2006\)](#); [Sheffer v. Buffalo Run Casino, PTE, Inc., 2013 OK 77, 315 P.3d 359 \(Okla. 2013\)](#).
- 7 [Filer v. Tohono O'Odham Nation Gaming Enterprise, 212 Ariz. 167, 129 P.3d 78 \(Ct. App. Div. 2 2006\)](#).

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IX. Civil and Criminal Courts and Proceedings in Indian Matters

G. Offenses Relating to Hunting, Fishing, and Game on Indian Land

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IX. Civil and Criminal Courts and Proceedings in Indian Matters

G. Offenses Relating to Hunting, Fishing, and Game on Indian Land

§ 168. Unlawful hunting or fishing on Indian land

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West's Key Number Digest

West's Key Number Digest, [Indians](#)  350 to 368(3)

A person who, without authority or permission, willfully goes on any land belonging to an Indian or Indian tribe, band, or group that is either held in trust by, or is subject to a restriction against alienation imposed by, the United States, or on any United States lands reserved for Indian use, to hunt, trap, or fish on the land, or to remove game, peltries, or fish, may be fined or imprisoned, or both, and all game, fish, and peltries in the person's possession must be forfeited.¹ The statute applies to federal court charges against nonmembers of tribes for violations of Indian land and is not enforceable by charges under state law in state court.²

A claim of Indian heritage, without tribe membership, is not a sufficient defense under the statute.³

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Footnotes

- ¹ 18 U.S.C.A. § 1165.
As to tribal hunting and fishing, generally, see §§ 58, 59.
- ² *State v. Shook*, 2002 MT 347, 313 Mont. 347, 67 P.3d 863 (2002), as amended on denial of reh'g (Feb. 11, 2003).
- ³ *U.S. v. Murdock*, 919 F. Supp. 1534 (D. Utah 1996), judgment aff'd, 132 F.3d 534 (10th Cir. 1997).

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G. Offenses Relating to Hunting, Fishing, and Game on Indian Land

§ 169. Unlawful transporting or acquiring fish or wildlife from Indian country

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West's Key Number Digest

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By federal statute, it is unlawful for any person to acquire or transport any fish or wildlife taken or sold in violation of any Indian tribal law,¹ to the extent that the tribal law applies within Indian country.² Non-Indian status is not an essential element of jurisdiction for a violation of this statute.³

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Footnotes

- ¹ 16 U.S.C.A. § 3372(a)(1), (3).
- ² 16 U.S.C.A. § 3371(c).
- ³ U.S. v. Gardner, 244 F.3d 784 (10th Cir. 2001).

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